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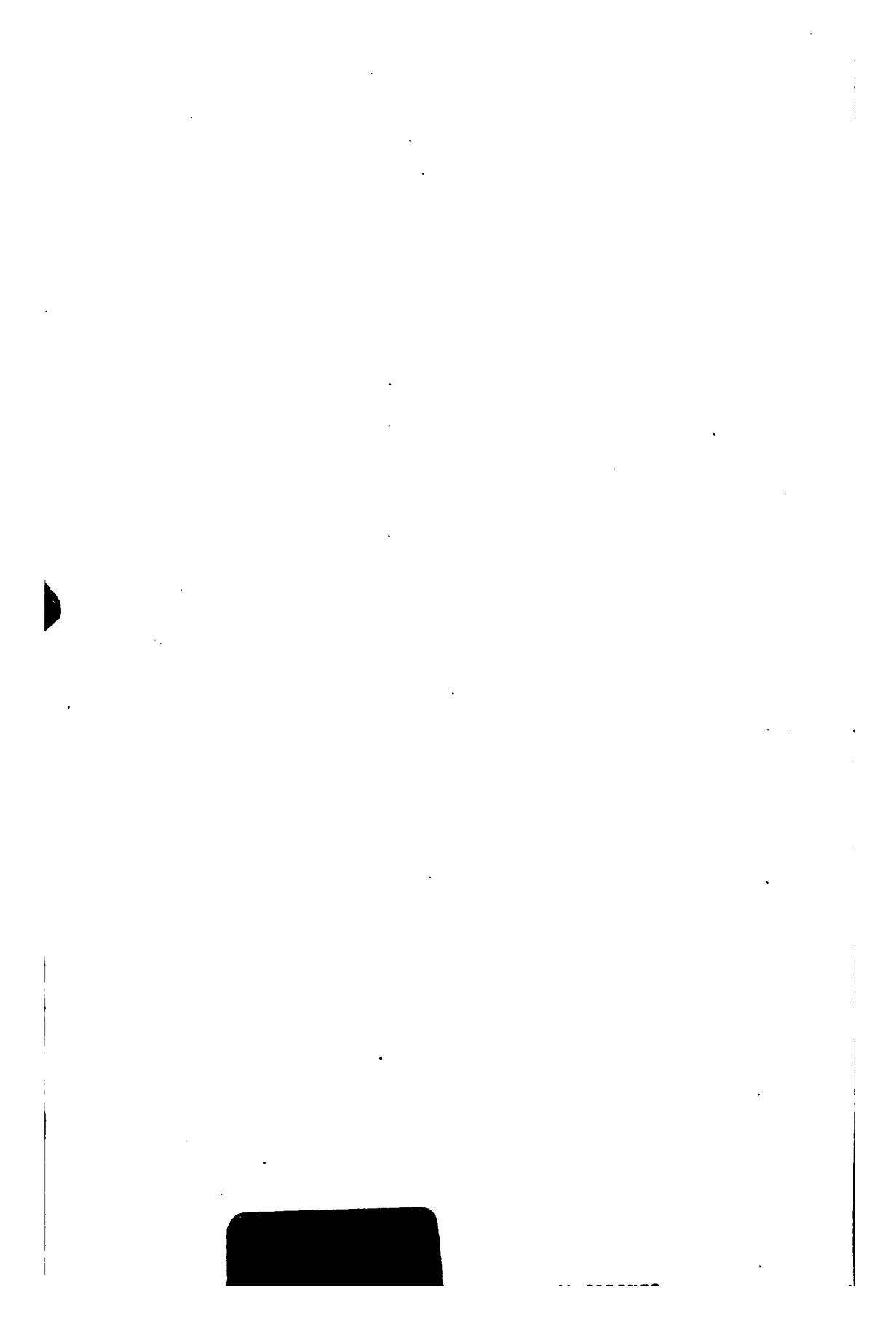
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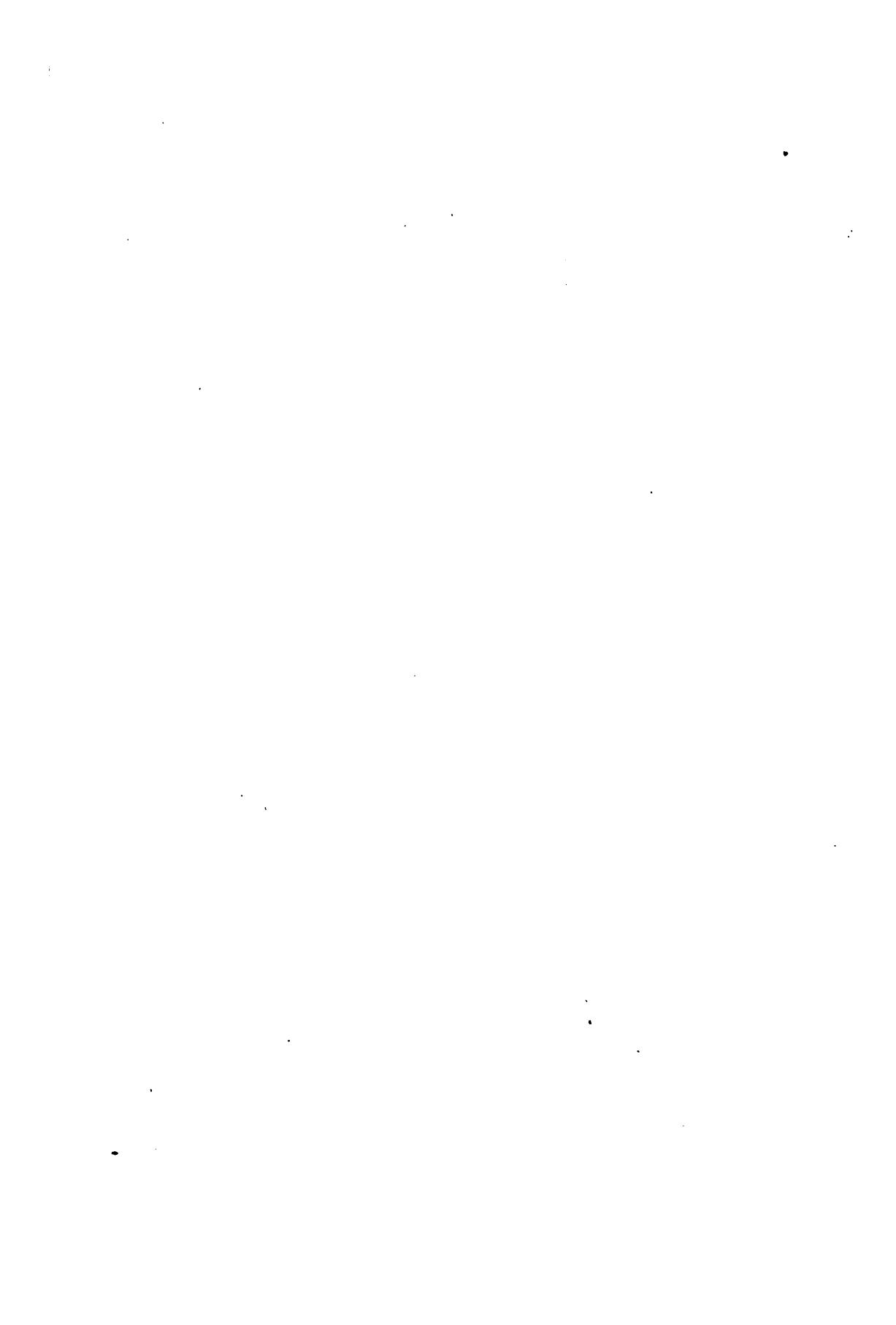
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INTERPRETATIONS
OF
THE CIVIL CODE
SINCE 1898

Containing the interpretations which the Supreme Court of Louisiana has given to the Articles of the Civil Code of that State during the period from 1898 to 1912, and to be found in the Reports from the 51st Louisiana Annual to the 130th Louisiana, inclusive.

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1912

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INTRODUCTORY.

Realizing the need of the Louisiana lawyers for a quick reference to the recent decisions of the Supreme Court interpreting the Articles of the Civil Code, I have very carefully compiled this work. I hope that my efforts have been successful in giving the Bar of this State a work that will be useful to the practitioner. There have been many important decisions in the last fourteen years, and I am sure that any one bearing on the Code can be immediately found in this work when used in conjunction with the Code.

I will be satisfied if the book will have served its purpose, even though I receive no remuneration for my work and time spent in preparation.

I hope this will meet with the approval of the Bar of Louisiana.

J. B. HEROLD.

SHREVEPORT, LA., September 16, 1912.

NOTE.—References to articles found at the beginning of an article show under which articles you will find excerpts in point. References below an article show articles of the Code interpreted with the article.

Interpretations of the Civil Code SINCE 1898.

Art. 4.

It is competent for the Legislature to change the method of procedure and the form by and in which particular cases are pending, or are to be tried; and a party interested has no just cause for complaint merely because such change is made after his right of action or a right of action against him arises.

Act No. 129 of 1896, although approved July 9th, was not promulgated at the State capital, where the State journal is published, until July 25th, from which it follows that it did not take effect in New Orleans until August 14, 1896. Article 40 of the Constitution of 1879 provided (and Art. 42 of the present Constitution provides) that no law passed by the General Assembly, except the general appropriation act, or act appropriating money for the expenses of the General Assembly, shall take effect until promulgated. A law shall be considered promulgated at the place where the State journal is published the day after the publication of such law in the State journal, and in all other parts of the State twenty days after such publication. *State vs. Fourchy*, 106 La. 759 (31 Sou. 325).

Art. 5. See Art. 4.

Art. 6. See Art. 4.

Art. 8.

The terms of Art. 186 of the Constitution of 1898 relate to the future, and their effect is prospective only; and they cannot be given a retrospective operation, the result of which would be a remission of a large amount of delinquent taxes, in the absence of any provision clearly indicative of that purpose on the part of the framers of the organic law. *Succession of William Parham and Martha Rhodes, His Wife*, 51 La. An. 980 (26 Sou. 700).

Art. 9. See *Cox et al. vs. Von Ahlefeldt et al.*, 105 La. 553.

Art. 10.

An obligation maturing on a *dies non* in Louisiana is exigible only on the day after, while in some of the sister States it is due and exigible on the day before. When performance is required in Louisiana, it can only be required in accordance with the delays allowed by her laws. *Elgutter vs. Mutual Reserve Fund Life Association*, 52 La. An. 1741 (28 Sou. 212).

A will made in Mississippi creating a *fidei commissa* in this State cannot be executed here. *Succession of Herber*, 128 La. 111 (54 Sou. 579).

Art. 11.

A sale made by a married woman with the authorization of her husband for the recited consideration of a price paid cash by the vendee is *prima facie* valid; and a subsequent sale of the property by the vendee to a third party acting in good faith on the faith of the public records is protected from a rescission by the wife of the original sale on the ground that it was not really a sale, but the taking up of a mortgage securing her husband's debt which she had executed in favor of the apparent vendee, and that she executed the act under marital influence, coercion and the fraudulent representations of her husband and the fraud in the vendee. *Colgin vs. Courrege*, 106 La. 684 (31 Sou. 144).

The father cannot be excused from the obligation of accepting the tutorship of his own children. (C. C., Art. 301). He cannot abdicate his tutorship and permit another person to be appointed tutor. Such an appointment is null. *James vs. Meyer*, 7 South. 618; 41 La. An. 1103; *Succession of Watt*, 111 La. 937 (36 Sou. 31).

The article of the Code which limits the donation of movables to one-tenth part of the value of the estate of the donor (C. C., Art. 1481) must be read in connection with Art. 12 of the same Code, which provides that "whatever is done in violation of a prohibitory law is void, although the nullity be not formally directed." Furthermore, every disposition in favor of a person incapable of receiving shall be null. *N. Y. Life Ins. Co. vs. Neal*, 114 La. 652 (38 Sou. 485).

There were two contracts entered into: the first, between the contractor and the City of New Orleans; the second, between the contractor and others formed into a partnership to execute the first contract. The last contract was tainted with nullity; in consequence, both fell within the grasp of the prohibitory law, and the certificates based thereon in the hands of plaintiff are null and void, and cannot form the basis of a judgment. *McManus vs. Scheele*, 116 La. 72 (40 Sou. 535).

A donation of all property is prohibited by law, and, as a consequence, null and void. *Ackerman vs. Larner*, 116 La. 102 (40 Sou. 581).

A condition of inalienability attached to a donation for pious uses is null and void, and reputed not written, both as creating a tenure of property not provided for by our Code, and, therefore, impliedly forbidden, and as putting property out of commerce, and, therefore, contrary to public policy. *Female Orphan Society vs. Y. M. C. A.*, 119 La. 278 (44 Sou. 15).

The distinction between nullities susceptible of ratification and those not susceptible may be found in *Doucet vs. Fenelon*, 120 La. 44 (44 Sou. 908).

The husband, having obtained judgment of final divorce awarding him the unconditional custody of the minor children of the marriage, is without legal capacity to abdicate his trust by a subsequent agreement with his divorced wife; and such an agreement, purporting to vest in her the temporary or conditional custody of the children, cannot operate as a bar to his recovering possession of them. *Farr vs. Emuy*, 121 La. 91 (46 Sou. 112).

Substitution and *fidei commissa* are, however, prohibited as a rule of public order; and, if individuals cannot create them by their conventions, still less can they do so by estoppels or pleas of estoppel. *Succession of LeBlanc*, 128 La. 1061 (54 Sou. 704).

Refer to Arts. 122, 129, 130, 301, 488, 1481, 1497, 1520, 1885, 1886.

Art. 12. See Art. 11; also the following:

Art. 546 of the Code of Practice prohibited the signing of a judgment until after three judicial days had elapsed. Art. 12 declares that whatever is done in violation

of a prohibitory law is null. *Durbridge vs. State*, 117 La. 844 (42 Sou. 337).

The fact of having ineffectually urged an erroneous legal proposition cannot serve as the basis of an estoppel under Art. 12. *Sandoz vs. Sanders*, 125 La. 398 (51 Sou. 436).

Art. 13.

The summons and notices by which the abandonment of the wife by the husband is required, by C. C., Art. 145, to be made to appear cannot be given within shorter periods than the law directs; but it is no obstacle to a legal judgment of separation from bed and board that they should have been made with longer intervals between them than the statute fixes. Interpreted according to Art. 13. *Derby vs. Dancey*, 112 La. 891 (36 Sou. 795).

The homestead claim of the widow and minor children left in necessitous circumstances, as set forth in Art. 3252 of the Revised Civil Code of 1870, is superior to the "expenses of last illness" and all the other general privileges set forth in Art. 3254 of the same Code. Jurisprudence reviewed. *Succession of Campbell*, 115 La. 1035 (40 Sou. 449).

Under Act 73, p. 116, of 1876, the lien for the amount due remains "as such charge" on the property. The city has a full right, and the property is sold subject to that right, which primes all others. Under the terms of Act 85, p. 111, of 1888, the property passes to third persons, adjudicatees, subject to the statutory pledge. It is different if it be adjudicated to the State under Act 80, p. 88, of 1888. *S. D. Moody & Co. vs. Sewerage & Water Board*, 117 La. 361 (41 Sou. 649).

Refer to Arts. 145, 3252, 3254.

Art. 14.

In a suit by married women the mere statement that they are joined and assisted by their husbands will not suffice. C. C., Art. 14; C. P., Art. 16; 2 An. 140; 7 An. 477; 11 An. 265; *Hayes et al. vs. Dugas et al.*, 51 La. An. 447 25 Sou. 121).

The waterworks company, whilst enforcing its excessive, unauthorized and illegal charges, has unjustly discriminated between citizens and other corporations with respect to their supply of an element and a commodity equally necessary to human existence and to human affairs.

This violation of the law and of its charter obligations is not one the effect of which is confined to the company as a business entity or to the investment of its stockholders. It inures to their pecuniary advantage; but, in its operation, it oppresses, and has oppressed, and will continue, if allowed to continue at all, in perhaps even greater degree, to oppress, an absolutely dependent public. In view of these facts, the law demands that the privileges and corporate life thus abused should be withdrawn. And it requires no other law, and no other reconstruction of law, than such as is found in, and authorized by, the Civil Code of this State to reach such a conclusion. (See Arts. 18, 447.) *State vs. Water-Works Company*, 107 La. 28 (31 Sou. 395).

Courts and writers seem to have no hesitancy at all in applying the word "manufacture" to sugar refining; in fact, they seem to have been unable to express themselves on the subject of sugar refining without making use of the word "manufacture." It is such use that fixes the popular meaning of a word, and the word as used in the Constitution has to be construed according to its popular meaning. *State vs. Sugar Refining Co.*, 108 La. 645 (32 Sou. 965).

"room" was used to designate a room in which betting on

The decisions of this Court show that the term "pool-races was carried on. *State vs. Maloney*, 115 La. 514 (39 Sou. 551).

The object of the Constitutional Convention in framing Art. 230 was to hold out to capital an inducement to open and work mines in the State; they did not have in mind oil wells and oil fields, which are temporary and evanescent in their nature. *J. M. Guffey Petroleum Co. vs. Murrell*, 127 La. 485 (53 Sou. 705).

Strangers are third parties generally; all persons in the world who are not parties. *Succession of Baker*, 129 La. 80 (55 Sou. 714).

Refer to Art. 447.

Art. 16.

The petition in this case and the statute (Art. 270 of the Constitution and Act 202 of 1898) should be construed together. *Gooden et al. vs. Police Jury of Lincoln Parish et al.*, 122 La. 755 (48 Sou. 176).

Compare "stranger" with "relations." *Succession of Baker*, 129 La. 82 (55 Sou. 714).

Refer to Arts. 48, 391, 1735, 2341, 2967.

Art. 17. See Succession of Baker, 129 La. 83; **see Arts. 14, 16, above.**

The laws to suppress "poolrooms" and "turf exchanges" are on the same subject-matter; and what is clear in one statute may be called in aid to explain what is doubtful in another. (C. C., Art. 17.) *State vs. Maloney*, 115 La. 514 (39 Sou. 539).

The requirement is in order that a voter may vote at a special election to raise a tax—viz., payment of a poll tax the two years preceding. The purpose for which the tax is intended shall be submitted to a vote of the property-tax payers entitled to vote under the election laws of the State. Compare Arts. 232, 215, 212, of the Constitution. *Gruner vs. Police Jury*, 119 La. 551 (55 Sou. 714).

Art. 18. See State vs. Waterworks Company, under **Art. 14**; see Succession of Baker, 129 La. 85.

Act 49 of 1894, Section 12, reads as follows: "That any itinerant vendor of any drug or nostrum or application of any kind intended for the treatment of disease or injury, or who may, by writing, print or other methods, profess to cure or treat disease deformity by any drug, nostrum manipulation or other expedient in this State, shall if found guilty, be fined," etc. According to C. C., Art. 18, and Hennen's Digest, Vol. 1, pp. 783, 784, interpreted that it can be read leaving out the parts which make it unintelligible. *State ex rel. Wynne vs. Judge*, 106 La. 406 (31 Sou. 14).

Art. 21.

The competency of the Judge *quoad* the subject-matter and the parties litigant being conceded, it includes not only the power expressly conferred by law, but all such power as may be necessary to the full exercise and enjoyment of that expressly conferred. C. P., Arts. 130, 877; C. C., Art. 21; *Schwan et al. vs. Schwan et al.*, 52 La. An. 1188 (27 Sou. 678).

The doctrine of marshalling assets, resting as it does upon equity and natural justice, is recognized here as it is in every enlightened system of jurisprudence. *Wiley vs. St. Charles Hotel Co.*, 52 La. An. 1581 (28 Sou. 182).

Courts have full authority to liquidate and settle a partnership. Story on Partnership, Sec. 333; *State ex rel. Dauphin vs. Judge*, 108 La. 534 (32 Sou. 340).

A sum of money paid in error, when it is determinate, may be attached, as it is not *ex delicto*. *Morgan's Louisiana, etc., vs. Stewart*, 119 La. 401 (44 Sou. 140).

If, by the acts of third parties, the property leased has become unfit for use, the lessee can be absolved from his lease. *Reynolds vs. Egan*, 123 La. 295 (48 Sou. 940).

Where a party not in actual possession, but claiming to be the owner of certain real estate, brings suit against another not in actual possession, alleging that the latter has inflicted injury upon him by destroying the recorded evidence of his title, and by causing a pretended and fraudulent adverse title to be inscribed, he will have a hearing. *Lacroix vs. Villo*, 123 La. 460 (49 Sou. 20).

A large discretion is allowed the Judge where there are several parties claiming a fund. Where the holder of a good mortgage note and the holder of a forged note claim the fund deposited in the registry of the court by the maker thereof, the holder of the good note is entitled to be paid, and the loss must fall on the holder of the forged note. *Lauterbach vs. Seikman et al.*, 125 La. 839 (51 Sou. 1008).

Refer to Arts. 1933-2703, 2815.

Art. 23.

The provision of the legislative charter of a municipal corporation with regard to the election of its officers is not impliedly repealed by the provisions of a subsequently enacted general election law which makes no mention thereof. *Frunk M. Welch vs. Henry S. Gossens et al.*, 51 La. An. 852 (25 Sou. 472).

It is manifest that Act No. 10, p. 9, of 1896, empowering cities and towns (the City of New Orleans excepted) having a population exceeding ten thousand to pave streets and to levy special taxes and contributions on the abutting owners of real estate and railroads occupying a portion of the street, was, as to the City of Baton Rouge, repealed by Section 35 *et seq.* of Act 169, p. 340, of 1898, incorporating said city, which provides that the cost of paving any street shall be borne by the City of Baton Rouge and the abutting owners of real estate in certain proportions. *Louisiana Improvement Co. vs. Baton Rouge Electric & Gas Co. et al.*, 114 La. 534 (38 Sou. 444).

Art. 26.

A child remains under the authority of his father and mother until his majority or emancipation, and is bound to

obey them in everything that is not contrary to good morals and the law; and during his minority, unless emancipated, he is without legal capacity to leave the parental domicile permanently and select for himself another domicile or residence without the consent of his parents. *Prieto vs. St. Alphonsus Convent*, 52 La. An. 631 (27 Sou. 153).

Refer to Arts. 34, 35, 36, 37, 39.

Art. 34. See Art. 26.

Art. 35. See Art. 26.

Art. 36. See Art. 26.

Art. 37. See Art. 26; also the following:

The common-law rule that the minor becomes a major "on the beginning of the day preceding the twenty-first anniversary" of his birth does not prevail in the State of Louisiana, which, by Codal provision, has adopted the civil-law rule that minors are persons "who have not yet attained the age of twenty-one years complete." *State ex rel. Fleming vs. Jolce et al.*, 123 La. 638 (49 Sou. 221).

Art. 38.

A domicile once acquired remains until a new one is acquired *facto et animo*. See Arts. 41, 43. *Ballard vs. Puleston et al.*, 113 La. 239 (36 Sou. 952).

In this case Mr. Filhiol had an habitual home in Ouachita Parish, where he had his principal establishment; but he also had an establishment at No. 1715 Second Street. *Succession of Filhiol*, 119 La. 1004 (44 Sou. 843).

The party who wishes to avail himself of a change of domicile bears the burden of rebutting the presumption that there has been no change. Arts. 38, 41, 42; *Succession of Simmons*, 109 La. 1097; *Kinder vs. Scharff et al.*, 125 La. 594 (51 Sou. 654).

Domicile is a legal relation which exists between a person and a particular place, originating in residence and intention or created by law, as in case of birth, marriage, minority or interdiction. A person may reside alternately in several places, but his domicile is in the parish where he has his principal establishment; that is, his habitual residence, or, in plain English, "home." *Oglesby vs. Turner*, 127 La. 1096 (54 Sou. 400).

Defendant's domicile in the State of Louisiana was not changed by his temporary residence for business purposes

in the State of Texas. *Gates vs. Otis*, 129 La. 1063 (57 Sou. 371).

Refer to Arts. 41, 42.

Art. 39. See Art. 26; also the following:

Mr. Hinton provided himself with two places of residence, and since 1903 they have spent more of their time at one place than at another. There is absolutely nothing to show that in so doing it was his intention to abandon the domicile that he had acquired in Mississippi, or, in the legal acceptation of the term, to "acquire a domicile" in Louisiana. *First National Bank vs. Hinton*, 123 La. 1025 (49 Sou. 693).

A boy seventeen years old went to reside in the City of New Orleans in 1900, with the consent of his father, and has since resided there (1910). He is a good witness to a testament in New Orleans, because the Code refers to residence in fact and not legal domicile. *Oglesby vs. Turner*, 127 La. 1098 (54 Sou. 400).

Refer to Arts. 120, 1591. .

Art. 41.

This article also applies to persons moving from other States to Louisiana, and the burden of proof is on the one making the change that he has changed his domicile. *Suc. cession of Simmons*, 109 La. 1097 (34 Sou. 101).

Art. 41. See Art. 38; *Ballard vs. Puleston*, 113 La. 239;

Kinder vs. Scharff, 125 La. 594.

Refer to Arts. 42, 43.

Art. 42. See Art. 38, Kinder vs. Scharff, 125 La. 594.

Where a party has removed from one parish to another without making a formal declaration of intention, as provided by C. C., Art. 42, he may be sued within the year, at the option of the party claiming, in either parish; and the fact that his domicile in the parish *ad quem* is with his employer does not affect the question. *Vallee vs. Hunsberry*, 108 La. 137 (32 Sou. 359).

The residence must be actual and *bona fide* at the time of the registration of the declaration of intention to change domicile. *State vs. Joyce*, 123 La. 635 (49 Sou. 219).

The highest proof in this State of an intention to change domicile is by a declaration in writing signed by the party

making it and registered by the Recorder. *Succession of Burbank*, 129 La. 536 (56 Sou. 481).

Refer to Art. 1153.

Art. 43. See Art. 41; *Ballard vs. Puleston*, 113 La. 239; also, *Succession of Burbank*, 129 La. 536.

Art. 45.

In the absence of proof that a person otherwise qualified has acquired a residence elsewhere, he must be considered to be a resident of the parish where his work requires him to stay, where he was born, and where he always lived and voted; and it makes no difference that he has never had in said parish any other home than a boarding-house, while he has had in another parish a home where he has kept his wife and children, whom he has visited as often as he could. *Estopinal vs. Michel et al.*, 121 La. 879 (46 Sou. 907).

Art. 46.

It required a voluntary absence of two years to forfeit a domicile in this State. *Kinder vs. Scharff et al.*, 125 La. 594 (51 Sou. 654).

Art. 47.

The Civil Code contains provisions for the appointment of a general curator, so that the absentee may be represented on his return, or on his claiming the property, or, in the event of his never returning, because of his death, or for any other cause. R. C. C., Art. 47; *Tell vs. Senac et al.*, 122 La. 1043 (48 Sou. 449).

It must be observed that it is quite sufficient that the person "shall be absent or shall reside out of the State," either one or the other. No particular period is fixed for said absence or residence to have continued, that being left to the sound legal discretion of the Judge. *Williams vs. Pope Mfg. Co.*, 52 La. An. 1444 (27 Sou. 851).

Art. 48.

The law itself observed a distinction between servants and strangers (C. C., Art. 2967); just as it does between citizens and strangers (C. C., Art. 1490), or between relations and strangers, or a wife and strangers (C. C., Arts. 48, 391, 1735, 2341). *Succession of Baker*, 129 La. 80 (55 Sou. 714).

Art. 56.

Plaintiff has no right to claim the property that was sold to effect a partition. *Tell vs. Senac*, 122 La. 1045 (48 Sou. 449).

An attorney for absent heirs who has rendered no beneficial services to the succession is not entitled to a fee out of the State.

The fee of counsel for the succession, as fixed by the Judge before whom the services were rendered, will not be disturbed on appeal when not manifestly above the customary professional charges in similar cases. *Succession of Delano*, 128 La. 869 (55 Sou. 556).

Art. 57.

In this case there could have been no warrant or justification for opening the succession, because defendants took no proceedings to be placed in provisional possession of the property, as they should have done under Art. 57. *Martinez vs. Wall et al.*, 107 La. 741 (31 Sou. 1023).

Conceding that Art. 57 of the Code, under the term "absentee," applies to persons who have never resided in the State, that article presupposes that the absentee has property in the State, which of itself would give a Court jurisdiction, or that a suit be instituted against him. *West vs. Lehmer*, 115 La. 223 (38 Sou. 970).

Art. 62.

The curator continued to represent the property after the death of the absent owner until the heir asked to be placed in provisional possession contradictorily with the curator. The will also is probated contradictorily with the curator. *Tell vs. Senac*, 122 La. 1044 (48 Sou. 449).

Art. 65.

The dissolution of the community is carried on contradictorily with the curator, if there is such a community. *Tell vs. Senac*, 122 La. 1044 (48 Sou. 449).

Refer to Arts. 68, 72, 73, 74.

Art. 68. See Art. 65.**Art. 69.**

In this case the absentee would be only fifty-nine years of age, and consequently the heirs cannot sell his property.

Tobin vs. United States Safe Deposit & Savings Bank, 115 La. 373 (39 Sou. 35).

Refer to Art. 70.

Art. 70. *See Art. 69; also:*

The death of an absentee less than one hundred years old is never presumed. *Iberia Cypress Co. vs. Thorgeson*, 116 La. 222 (40 Sou. 682).

Art. 72. *See Art. 65.*

Art. 73. *See Art. 65.*

Art. 74. *See Art. 65.*

Art. 75.

Plaintiff has no right to claim property which was sold to effect a partition; and in the further statement, in substance, she may have a right of action against her co-heirs. *Tell vs. Senac*, 122 La. 1045 (48 Sou. 449).

Refer to Arts. 76, 77, 1315, 1399.

Art. 76. *See Art. 75.*

Art. 77. *See Art. 75.*

The objection to an acceptance of title raised by an adjudicatee of property, sold under a judgment of partition, that one of the joint owners of the property had not been made a party to the partition proceedings, will not be sustained where the evidence shows that the interest which is alleged to have been not represented was that of a presumptive heir in a succession opened in 1877, and whose existence was then unknown, and continues still to be unknown. Under such circumstances a partition sale made contradictorily with the co-heirs of the absentee, under decree of Court, will protect the purchaser. *Martinez vs. Wall*, 107 La. 737 (31 Sou. 1023).

Refer to Arts. 78, 1381.

Art. 78. *See Art. 77, Martinez vs. Wall, 107 La. 737.*

Art. 81.

The meaning of the word "disappeared" in this article is shown in the title of this Code, which treats of absentees, and in the chapter entitled "Of the Care of Minor Children When the Father Has Disappeared." *William vs. Pope Mfg. Co.*, 52 La. An. 1443 (27 Sou. 851).

Art. 86. See King vs. King, 122 La. 590; also, Quaely sv. Waldron, 126 La. 261.
Refer to Art. 91.

Art. 88.

The Court may stop counsel for the accused from arguing to the jury a proposition of law plainly and flagrantly at variance with the accepted and well-recognized law of the State as expressed in this article. *State vs. Menard*, 110 La. 1098 (35 Sou. 360).

Art. 91. See Art. 86.

Also, under the old law in France, the only exception to the rule that the nullity of marriage, by reason of error in the person, existed only where the error was one of physical identity, was where a slave was taken in marriage in the belief that such slave was free. *Delpit et al. vs. Young*, 51 La. An. 927 (25 Sou. 547).

Art. 94.

Whoever shall knowingly intermarry, or cohabit without marriage, being within the degrees of consanguinity prohibited by Arts. 94 and 95 of the Civil Code, shall be deemed guilty of incest. *State vs. Guiton*, 51 La. An. 157 (24 Sou. 784).

Act 78 of 1884, taken in connection with Arts. 94 and 95 of the Civil Code of Louisiana, to which it refers, sufficiently defines the crime of incest. *State vs. DeHart*, 109 La. 570 (33 Sou. 605); *State vs. Freddy*, 117 La. 122 (41 Sou. 436).

Art. 95. See Art. 94.

This article was amended by Act 9 of 1902 to read as follows: Among collateral relations, marriage is prohibited between brother and sister, whether of the whole or of the half blood, whether legitimate or illegitimate, between uncle and niece, between aunt and nephew, and also between first cousins.

No marriage contracted in contravention of the above provisions in another State by citizens of this State without first having acquired a domicile out of this State shall have any legal effect in this State.

No officer whose duty it is to issue a marriage license shall do so until he shall have received an affidavit from

one of the parties to be married to the effect that he or she is not related to the other party within the degree prohibited hereinbefore.

The child of a woman slave by a white man is a bastard, and cannot inherit the succession of the mother opened in the State of Louisiana since the adoption of Act No. 54 of 1894, p. 63, prohibiting marriage between white persons and persons of color. *Succession of Davis*, 126 La. 178 (52 Sou. 266).

Incest being the creature of statutory law in Louisiana, the subsequent prohibition of marriage between first cousins did not, *per se*, place this new class of persons within the grasp of the criminal statute. *State vs. Couvillion*, 117 La. 935 (42 Sou. 431).

Art. 97. See Art. 1621, 111 La. 981.

While we are of the opinion that Clerks of the Court are authorized to administer an oath to parties applying for a marriage license, we do not think they are under an absolute legal duty to do so, in the absence of circumstances which would call for such an oath. We are not prepared to accept as a closed question the opinion of this Court in *State vs. Dole*, 20 An. 378, to the effect that impediments contemplated by Art. 105 of the Civil Code are only those which would render the marriage null. *Barnidge et ux. vs. Kilpatrick*, 111 La. 593 (35 Sou. 758).

Refer to Art. 105.

Art. 98.

We do not think that written proof of having obtained the age of majority should be necessarily submitted to the Clerk in every case. *Barnidge vs. Kilpatrick*, 111 La. 593 (35 Sou. 758).

Art. 101.

When the Clerk of the Court does not know, and has never seen, the intended wife, and there is nothing in the particular case calculated to arouse his suspicions as to her being a minor, he is not guilty of negligence and failure of official duty, and liable in damages, for granting a license, relying upon the truthfulness of the statements made to him by the intended husband and the friend accompanying him, who signed as surety on the bond required to be given under Art. 101 of the Civil Code, that the parties

were of age and everything was right. *Barnidge vs. Kilpatrick*, 111 La. 593 (35 Sou. 758).

Art. 105. See Art. 97; also the following:

The formality of having three witnesses to sign a marriage contract and other formalities are not required if they live together thinking they are man and wife. *Landry vs. Belanger*, 120 La. 965 (45 Sou. 956).

Art. 110.

The words "mistake in the person," as used in Arts. 91 and 110, which prescribe the causes for which marriages may be annulled, do not mean mistake in character of the person, or in his or her attributes, conditions in life, or previous habits. *Delpit et al. vs. Young*, 51 La. An. 924 (25 Sou. 547).

Art. 111. See Bouterie vs. Demarest, 126 La. 284.

Thus, the great commentator (Marcadé) used the word "cohabitation" in the sense of congress. And our Article 111 manifestly uses it in the same sense. No one could doubt that a marriage could be ratified by the voluntary cohabitation of the parties in the sense of sexual intercourse, irrespective of any dwelling together. *State vs. Freddy*, 117 La. 125 (41 Sou. 436).

Refer to Art. 1855.

Art. 112. See Art. 110.

Where a minor marries without the consent of his parents, and is disinherited therefor, and the other heirs prove the facts on which the disinherison is founded, such disinherison must be sustained by the Courts. *Succession of Burns & Wife*, 52 La. An. 1379 (27 Sou. 883).

Refer to Arts. 1621, 1624.

Art. 113.

This article was amended by Act 129 of 1904, as follows: Every marriage contracted under the other incapacities or nullities enumerated in the second chapter of this title, may be impeached either by the married persons themselves, or by any person interested, or by the Attorney-General; however, first, that marriages heretofore contracted between persons, related within

the prohibited degrees either or both of whom were then and afterward domiciled in this State and were prohibited from intermarrying here, shall nevertheless be deemed valid in this State, where such marriages were celebrated in other States or countries under the laws of which they were not prohibited; second, that marriages hereafter contracted between persons, either or both of whom are domiciled in this State and are forbidden to intermarry, shall not be deemed valid in this State, because contracted in another State or country where such marriages are not prohibited, if the parties, after such marriage, return to reside permanently in this State.

Art. 115.

If it be assumed that Art. 137 is applicable to the defendant, and to the marriage contracted by her in Illinois, we are, nevertheless, of the opinion that said article is not framed in such terms of prohibition, especially when considered in connection with Arts. 115 and 960, as to justify the conclusion that a marriage entered into in contravention with its provisions is stricken with nullity. *Succession of Benton*, 106 La. 503 (31 Sou. 123).

A charge that a marriage contracted with a woman within ten months after her divorce is a nullity, and that the other contracting party is not guilty of bigamy in there-after marrying another woman, unless it appears that he had continued to live with the first wife as her husband until after the expiration of such ten months, is more favorable to the defendant on trial than he had a right to expect. *State vs. Stevenson*, 115 La. 777 (40 Sou. 44).

Refer to Arts. 137, 960.

Art. 116.

This article was amended by Act 150 of 1906, as follows: A married person to whose prejudice a second marriage has been contracted can sue for the nullity of such marriage, even during the life of the other party with whom he or she had contracted the first marriage. In case the second marriage has been contracted in this State and the defendant has left the State, an attorney shall be appointed by the Court to represent the absent defendant.

Art. 117. See Succession of Fortier, 51 La. An. 1587.

The wife and her daughter, born of a marriage either null relative or absolutely, are entitled to the benefit of the civil effects therefrom. *Succession of Benton*, 106 La. 503 (31 Sou. 123).

A statutory right of action arising after the death of the husband is not one of the civil effects of marriage which inures to the benefit of the putative wife under Arts. 117 and 118. *Vaughn vs. Dalton-Lard Lumber Co.*, 119 La. 61 (43 Sou. 926).

Refer to Art. 118.

Art. 118. See Succession of Fortier, 51 La. An. 1587; see Art. 117.**Art. 119.**

It is against the policy of the State that husbands and wives should be heard complaining of one another during marriage. Application for writ of *habeas corpus* by the husband for the custody of the minor child denied. *State ex rel. Lasserre vs. Michel et al.*, 105 La. 745 (30 Sou. 122).

A wife being entitled of right to support and maintenance from her husband during the marriage, it is not necessary, therefore, that she should prove her necessitous circumstances as a prerequisite or a condition precedent to recovering alimony *pendente lite* in a suit for separation from bed and board or divorce. *Nissen vs. Faquhar*, 121 La. 647 (46 Sou. 680).

A wife has no action for the recovery of the parapernal funds which she used for the benefit of the community at a time when her husband was ill and had no property, as husband and wife owe aid and assistance to each other. *Succession of Turgeau*, 130 La. — (58 Sou. 497).

Refer to Art. 120.

Art. 120. See Art. 119; see First National Bank vs. Hinton, 123 La. 1025; see Art 39.

This article of the Code does not control when the husband left the wife in another State. *Nicholas vs. Maddox*, 52 La. An. 1494 (27 Sou. 966).

The failure or refusal of the husband to support his wife is not ground for separation from bed and board. *Van Horn vs. Arantes*, 116 La. 133 (40 Sou. 592).

The husband has the exclusive right to select the matrimonial domicile, and the wife is bound to follow him wherever he chooses to reside. *Birmingham vs. O'Neil*, 116 La. 1085 (41 Sou. 323).

The wife may be the head of the family where she is the breadwinner (Const. Art. 244). *Ginsberg vs. Groner*, 117 La. 269 (41 Sou. 569).

Refer to Arts. 121, 122.

Art. 121. See Art. 120.

The recital in the petition that the wives are joined and assisted by their husbands is not the equivalent of the authorization of their husbands appearing of record; nor can we hold that the suit is by the husbands, as they are not introduced as plaintiffs. *Haynes et al. vs. Dugas et al.*, 51 La. An. 450 (25 Sou. 121).

The wife who is a public merchant engaged in separate trade cannot appear in court without the authorization of her husband. *M. M. Sanders & Sons vs. Schilling*, 123 La. 1012 (49 Sou. 689).

Art. 122. See Arts. 11, 120

A married woman can, with the authorization of her husband, mortgage her separate property for the purpose of obtaining money to improve it. The improvements paid for with the money borrowed became her separate property. To borrow, she need not be authorized by the Court. *Teutonia Loan & Building Co. vs. Cronan*, 115 La. 537 (39 Sou. 552).

Refer to Art. 123.

Art. 123. See Art. 122.

Art. 125.

It authorized the giving of a mortgage to secure an already existing debt, which is a thing the Act of 1855, now Arts. 125, 126 and 127 of the Civil Code, does not authorize, as has been repeatedly decided. *Kohlman vs. Cochran*, 123 La. 242 (48 Sou. 914).

Refer to Arts. 126, 127.

Art. 126. See Art. 125.

In attacking transactions, the wife is not estopped by her own admissions or conduct; and, in cases of authentic

acts, is not confined to counter-letters or interrogatories on facts and articles, but may resort to parol evidence. *Caldwell vs. Trezevant*, 111 La. 415 (35 Sou. 619).

The now established doctrine upon that subject is that a married woman may mortgage her property by act importing confession of judgment for debts other than those of her husband, with the authority of her husband, given with or without that of the Judge, the method provided by the Act of 1855 being regarded as cumulative, and not exclusive, the difference being that, where she acts without the authority of the Judge, and raises the issue, the burden rests upon the creditor to show that the debt inured to her benefit; whereas, in the other case, the authentic act furnishes full proof against her. *Seckinger vs. Cheneyville*, 125 La. 286 (51 Sou. 197).

Refer to Arts. 127, 128, 2398.

Art. 127. See Arts. 125, 126.

A married woman separate in property cannot be held on notes as a *femme sole* unless she has been duly examined as an applicant for a loan and has obtained a certificate from a competent Judge. If she has not obtained such a certificate prior to a loan, it is incumbent upon the creditor to prove that the consideration for the notes inured to her separate use and benefit. *Dayries vs. Lindsly*, 128 La. 259 (54 Sou. 791).

Refer to Art. 2398.

Art. 128. See Arts. 126, 127.

Where a married woman authorized by her husband presents a sworn petition alleging that she desires to borrow money for her separate benefit, and, being examined by the Judge out of the presence of her husband, is authorized to contract the debt, the holder of the mortgage note, who acquires the same in good faith for full value before maturity, is entitled to full protection. *Josephson vs. Powers et al.*, 123 La. 5 (48 Sou. 64).

Art. 129. See Art 11.

A married woman may sign a renunciation with her husband of a homestead, and be thereby bound without the necessity of her examination as a renouncer out of the presence of her husband, and without the necessity of the re-

cital in the deed that she observed the formalities required by Art. 129 touching her paraphernal rights. The jurisprudence of other States under different laws is not persuasive on the subject. *Cormier et ux. vs. Hoyt*, 116 La. 602 (39 Sou. 699).

Art. 130. See Art. 11.

Art. 132.

It is sufficient if a wife suing in her own name obtain the authorization of her husband or of the Court at any time before the trial on the merits. In the case if the interdiction of the husband, the Court may authorize the wife to sue. *Cartwright vs. Puissigur*, 125 La. 701 (51 Sou. 692).

Art. 134.

Proceedings to annul a purchase of land by the wife for want of authority can be instituted only by the husband or wife, or by their heirs. *In re Sheehy*, 119 La. 608 (44 Sou. 315).

Art. 137. See Art. 115.

Art. 138.

We find that, following the shooting of herself, she did denounce her husband to the officers of the law, made affidavit charging him with the crime, and caused his arrest. This was not only an unfounded charge, but she knew it to be unfounded, and it constitutes public defamation of the husband, and is legal ground on his part for a judgment of separation. *Linzay vs. Linzay*, 51 La. An. 635 (25 Sou. 308).

The spreading of a report that the wife is insane, and the publishing of a notice that the husband will not be responsible for any debts she may contract, are not sufficient in themselves to support an action for separation from bed and board on the ground of defamation; but these facts will contribute materially to the support of an action on the ground of excesses and cruel treatment, especially in the case where the wife is a woman of culture and refinement. *Harrison vs. Harrison*, 115 La. 817 (40 Sou. 232).

The allegations that the husband has failed to support the wife, and that she has been compelled to live with her parents, that he has contracted debts and has failed to pay

them, and that he has pawned her piano, do not separately or collectively disclose a cause of action for separation from bed and board; but the allegation that the husband is subject to such paroxysms of rage as to cause her to fear for her life, and to render them living together insupportable, does disclose such cause of action. *Thompson vs. Emery*, 127 La. 719 (53 Sou. 968).

Art. 139.

A suit for divorce based on a judgment of separation from bed and board is premature when instituted within less than one year from the date of the finality of the judgment from the Supreme Court affirming the judgment of the Court below, from which a suspensive appeal had been taken. This article contemplates a judgment final and executory between the parties. *Hill vs. Hill*, 114 La. 117 (38 Sou. 77).

Abandonment must be shown by the provisions of Art. 145. *Van Horn vs. Arantes*, 116 La. 133 (40 Sou. 592).

Art. 140.

As relates to the material points in the course of proceedings for divorce, each of the parties to the suit should decline to enter into an agreement facilitating the proof of the offense. The main issues should be left to be made out by the respective parties. *State vs. Richardson*, 122 La. 1065 (48 Sou. 458).

Art. 142.

Article 142, which authorizes proceedings by substituted process against absent husbands for separation from bed and board, cannot be extended to proceedings in divorce. *Connella vs. Connella*, 114 La. 951 (38 Sou. 690).

Art. 143.

Abandonment without a lawful excuse, under the Civil Code of Louisiana, must be made to appear by a judicial proceeding. *Williams vs. Nona Mills Co.*, 128 La. 813 (55 Sou. 415).

Refer to Art. 145.

Art. 144. See Art. 143.

Art. 145.

Where, in an action for separation from bed and board on the ground of abandonment, "the three reiterated sum-

monses" required by Art. 145 of the Civil Code are issued and served, and, after answer filed by the defendant, there is a trial, in which testimony is offered, arguments presented, and the case is submitted, the Judge may dismiss the suit, or he may render the judgment mentioned in the article, sentencing the defendant "to comply with such request," or he may, perhaps, make some other tentative or interlocutory order; but he cannot, at that stage of the case, render a definitive judgment of separation. But this is cured by subsequent compliance with law regarding notice. *Bursha vs. Lane*, 105 La. 112 (29 Sou. 712).

The summons and notices by which the abandonment of the wife by the husband is required by Art. 145 of the Civil Code to be made to appear cannot be given within shorter periods than the law directs; but it is no obstacle to a legal judgment of separation from bed and board that they should have been made with longer intervals between them than the statute fixes. *Derby vs. Dancey*, 112 La. 891 (36 Sou. 795).

Abandonment or desertion is no ground for divorce or separation from bed and board unless made to appear in the manner prescribed by Art. 145 of the Civil Code. *Van Horn vs. Arantes*, 116 La. 130 (40 Sou. 592).

That adopted by the Clerk of the District Court by which the wife was called upon to show cause, if any she had, why she should not return, was the act of the Clerk, and not the mandate of the law. The law itself called for what may be designated a "flat" summons to return. *Baurens vs. Giroux*, 117 La. 701 (42 Sou. 224).

The summons which issues to a wife from the Court in an action for a separation from bed and board, under Art. 145 of the Revised Civil Code, must, where the original matrimonial domicile existing prior to the institution of the suit had been broken up, give her definite information as to where the husband has established a new matrimonial domicile. *King vs. King*, 122 La. 580 (47 Sou. 906).

Refer to Art. 139.

Art. 146. See Art. 143.

Art. 147. See Nissen vs. Farquhar, 121 La. 647.

Defendant sued out a rule against plaintiff, asking for a suspension of the allowance to his wife which had been

decreed. The rule was made absolute in due time. The ground on which the Court acted in setting aside the decree of alimony was that no domicile had been appointed by the Court, as required by Art. 147 of the Civil Code. *Ellerbusch vs. Kogel*, 108 La. 51 (32 Sou. 191).

Art. 148. See *Meyers vs. Rosenthal*, 119 La. 987.

No presumption against her grows out of the fact that she did not sue out a rule for alimony *pendente lite* under Art. 148 of the Civil Code; but she must be held to a proof of the fact that she is poor and without means. *Jackson vs. Burns*, 112 La. 856 (36 Sou. 756).

There is no analogy between alimony ordered to be paid to the wife after a separation from bed and board and the support allowed to her in a judgment for divorce. In the former case, the right arises from a marriage not permanently dissolved; in the latter, a judgment for divorce; and the amount is allowed in the nature of support or pension. One is recovered under Article 148, and the other under Article 160. *State vs. Judge of Civil District Court*, 114 La. 44 (38 Sou. 114).

A prayer in petition for alimony after judgment has no application to Article 148. *Jackson vs. Burns*, 116 La. 695 (41 Sou. 40).

There was no testimony offered to prove that it was excessive [alimony allowed]. If excessive, as urged by defendant, he would not be precluded from making application for its reduction, the reduction to date from the day that the judgment would be rendered. *O'Brien vs. D'Hemicourt*, 118 La. 996 (43 Sou. 654).

The wife is not required to prove, as a condition precedent to being granted an order for alimony, that she is in necessitous circumstances. The relation of husband and wife continuing during such suit, the husband is under a legal obligation to furnish her support. *Nissen vs. Farquhar*, 121 La. 643 (46 Sou. 679).

In a suit brought by a husband to have the marriage declared a nullity, the wife cannot proceed by a rule therein to compel the husband to support their child, but is relegated to the remedy provided by Act 34 of 1902. *State vs. Barilleau*, 128 La. 1033 (55 Sou. 664).

Refer to Art. 160.

Art. 150.

Held, that judgment, *quoad* the separation of property, retroacted as far back as the day on which the petition was filed; that this was the rule as to the wife, and that there is no good reason why the rule should be different when a suit for a separation or divorce has been instituted by the husband. *Haddad vs. Haddad*, 120 La. 222 (45 Sou. 109).

Refer to Art. 155.

Art. 152.

The action of separation is extinguished by the reconciliation of the parties after the facts which might have given ground to such action. C. C., Art. 152. *Schaub vs. Schaub*, 117 La. 727 (42 Sou. 249).

Art. 153.

A reconciliation between spouses after facts have occurred which would give rise to an action for divorce, or for separation from bed and board, has the same effect in Louisiana as "condonation" does in the common-law States. That effect is set out in Art. 153 of the Civil Code. *Hill vs. Hill*, 112 La. 770 (36 Sou. 678).

Art. 155. See Art. 150.

This means there must be between these spouses a settlement of community affairs as well as a dissolution of the community. *Linzay vs. Linzay*, 51 La. An. 635 (25 Sou. 308).

The separation of property follows as a necessary legal incident. (C. C., Art. 155.) *Wagner vs. Glaeser*, 120 La. 604 (45 Sou. 519).

The Civil Code provided that separation from bed and board carries with it separation of goods and effects. Art. 155. We assume that the framers of the Civil Code advisedly omitted the provisions of the Code Napoleon relative to the re-establishment of the community by the formal consent of the parties in interest. *Crochet vs. Dugas*, 126 La. 289 (52 Sou. 495).

The children of the marriage must be placed under the care of the husband, in whose favor the judgment of separation is awarded. *Linzay vs. Linzay*, 51 La. An. 635 (25 Sou. 308).

The disposition of the child in Art. 157 is merely temporary. *Bursha vs. Lane*, 105 La. 117 (29 Sou. 712).

Art. 157.

Enforced as far as possible, considering the nature of the plaintiff. *Schlater vs. LeBlanc*, 121 La. 934 (46 Sou. 923).

In cases of separation from bed and board the children should be placed under the care of the party obtaining the separation; but the Judge may, for the greater advantage of the children, and with the advice of the family meeting, order that some or all of them shall be intrusted to the care of the other party. There is no such discretion in cases of divorce. (C. C., Art. 157.) *Crochet vs. Dugas*, 126 La. 286 (52 Sou. 495).

Art. 158.

Under R. C. C., Art. 158, divorce of parents does not deprive children of rights secured to them by law or by the marriage; and, under Act 34 of 1902, p. 42, it is a misdemeanor for a father to neglect wilfully to support his child in necessitous circumstances, though he may, by divorce or otherwise, have lost the custody of the child. *State vs. Seghers*, 124 La. 115 (49 Sou. 998).

Art. 160. See Art. 148.

The defendant objects on the ground that the wife, from whom he was divorced, had not shown that she was in necessitous circumstances, and has not complied with the phrase of the article which reads, "If the wife who has obtained the divorce has not sufficient means" (Art. 160, C. C.). *Jackson vs. Burns*, 112 L. 885 (36 Sou. 792).

Alimony can be allowed to the wife after she obtains a divorce, under Art. 160, C. C., only from the property, and not in excess of one-third of the income, of the husband. The word "property," as used in the article, does not mean earning capacity, nor does the word "income" mean current earnings resulting from labor. *Jackson vs. Burns*, 116 La. 695 (41 Sou. 40).

The failure of a defendant to pay promptly the alimony which he is ordered to pay by a judgment does not carry with it a contempt of court *per se* and *ipso facto* as the result of such failure. *Otillo vs. Otillo*, 119 La. 965 (44 Sou. 799).

Art. 161. See *Ducasse's Heirs vs. Ducasse*, 120 La. 738.

Where the petition for divorce specifically charges adultery and concubinage between the defendant and a named accomplice as the sole ground upon which the judgment prayed for could be rendered, and the judgment of final divorce recites that it was rendered after due proof, though the evidence be not preserved, the identification of the accomplice is complete for all the purposes of C. C., Art. 161, prohibiting and declaring null marriages between persons who are divorced for adultery and their accomplices in such adultery. *Succession of Gabisso*, 119 La. 740 (44 Sou. 450).

Art. 166.

A girl of seventeen years of age has not the legal right to leave her mother's home and enter a convent, with the expressed purpose of becoming a nun, without previously obtaining her consent; and should she enter a convent under such circumstances, and be received therein upon the supposition that she had obtained such consent, it is the province of the writ of *habeas corpus* to release her from such restraint and restore her to the rightful custody of her mother in due course of law. *Prieto vs. St. Alphonsus Convent of Mercy*, 52 La. An. 631 (27 Sou. 153).

Refer to Arts. 170, 215, 216, 217, 218, 219, 220, 246, 256, 387, 301, 250, 1782, 1798.

Art. 167.

To let out labor or industry is a contract by which one of the parties binds himself to do something for the other in consideration of a certain price agreed on by both of them. (C. C., Art. 2675.) Where the price is not fixed or certain between the parties, there is no contract. *Caldwell vs. Turner*, 129 La. 20 (55 Sou. 695).

Art. 170. See Art. 166; *Myers vs. Lansing*, 114 La. 145.**Art. 177.**

A rifle club is liable for injury to outside persons resulting from target practice on its premises. *Simmonds vs. Southern Rifle Club*, 52 La. An. 1114 (27 Sou. 656).

Refer to Art. 2315.

Art. 188.

This article does not use the word "cohabit" in the sense of the possibility of the husband's "dwelling with his wife," or of the possibility of his "holding her out to the world as his wife"; but simply of the possibility of his having access to her. *State vs. Freddy*, 117 La. 124 (41 Sou. 436).

Refer to Art. 189.

Art. 189. See Art. 188.**Art. 191.**

While the Code in terms bars only the husband and his heirs, after a certain delay, from questioning the legitimacy of the child born during marriage, this Court has held that the right is personal to the husband; and, if he fails to exercise it, the door is forever closed. *Ezidore vs. Cu-reau's Heirs*, 113 La. 842 (37 Sou. 773).

Refer to Art. 192.

Art. 192. See Art. 191.**Art. 193.**

Articles 193-197 of the Civil Code imply a suit to establish legitimate filiation. Such an action must necessarily be brought by the child claiming such a status against the mother or father, or both, or their heirs. *Ezidore vs. Cu-reau's Heirs*, 113 La. 844 (37 Sou. 773).

Refer to Arts. 196, 197.

Art. 194.

While it suffices for a child to sustain his claim to legitimacy to prove that he has been constantly considered as a child born during the marriage, that evidence is not conclusive. It may be met and completely rebutted by sufficient evidence showing that he is not the child of the marriage of which he claims to be an issue. *Succession of O'Neil*, 52 La. An. 1754 (28 Sou. 259).

Art. 196. See Art. 193.**Art. 197. See Art. 193.**

Art. 198. See Suc. of Fortier, 51 La. An. 1596.

The articles of the Civil Code relating to acknowledgment do not govern when in conflict with those relating to the legitimation of children. The articles cited above are imperative—namely, Arts. 198 and 200. *Landry et ux. vs. American Creosote Works*, 119 La. 231 (43 Sou. 1016).

There is only one class of illegitimate children that can be acknowledged—namely, the issue of persons capable of contracting marriage at the time of conception. Such children are properly called “natural,” a species of the class “illegitimate,” and the only kind that can be legitimated. *Succession of Davis*, 126 La. 184 (52 Sou. 266).

Refer to Arts. 199, 200.

Art. 199. See Art. 198.

Marriage is not the only mode of legitimation. Legitimation may also be effected by notarial act, and it carries the same consequences. It is not essential to the validity of an act of legitimation that it negatives the existence of the various causes which would constitute impediments to the legitimation. The existence *vel non* of these impediments depends upon proof *dehors* the act. *Davenport vs. Davenport*, 116 La. 1010 (41 Sou. 240).

Refer to Art. 200.

Art. 200. See Arts. 198, 199.

But only those natural children can be legitimated who are offspring of the persons who at the time of conception could have contracted marriage. Nor can a parent legitimate his or her natural children in the manner prescribed in this article when there exists on the part of such parent legitimate “ascendants” or “descendants.” *Hedges' Heirs vs. Kell*, 125 La. 100 (51 Sou. 80).

Art. 202.

A mere reference by a man in casual conversation to a child as his is not that proof of acknowledgment which makes him or her what the law describes as a natural child. *Succession of Vance*, 110 La. 760 (34 Sou. 767).

Where, in the act of legitimation or acknowledgment, the parent declares that he acknowledges the child, and “does hereby legitimate him,” and further declares that he

wishes that the child inherit "the same as if born in lawful wedlock," the act will be held to be one of legitimation, and not of mere acknowledgment; and this although in the same act the parent further declares that he does hereby legitimate said child as is contemplated by Art. 203 of the Civil Code of 1900, which article is the one providing for mere acknowledgment; and although he, moreover, in a will made on the same day, refers to the child as having been acknowledged. *Davenport vs. Davenport*, 116 La. 1010 (41 Sou. 240).

Refer to Arts. 203, 2022.

Art. 203. See Art. 202; Suc. of Davis, 126 La. 184.

Article 203 of the Civil Code is not prohibitive in terms, and must be taken and construed with another *in pari materiae*—viz., Art. 209 of the Civil Code, regarding the modes of acknowledgment of natural children. *Bourriaque et al. vs. Charles*, 107 La. 220 (31 Sou. 757).

Acknowledgment is a prerequisite to the inheritance of brothers and sisters of the estate of a sister born out of wedlock. *Succession of Gravier*, 125 La. 733 (51 Sou. 704).

The proof of acknowledgment has not been confined to Art. 203, and does not exclude Arts. 207 and 208. *Bourriaque vs. Charles*, 107 La. 220 (31 Sou. 757).

Art. 204.

Under the Civil Code of 1870, Art. 204, no illegitimate child can inherit from his parents unless they were capable of contracting marriage at the time of its conception. Act No. 68 of 1870, permitting the legitimation of natural children by declaratory acts before notaries public and two witnesses where there existed no other legal impediments to the intermarriage, except those resulting from color or to the institution of slavery, has no application to the case where the parents have not availed themselves of the benefit of the statute. *Succession of Davis*, 126 La. 178 (52 Sou. 266).

Art. 206. See Hodges' Heirs vs. Kell et al., 125 La. 97.

Art. 207. See Bourriaque et al. vs. Charles, 107 La. 220; Suc. of Vance, 110 La. 766.

Refer to Arts. 208, 209.

Art. 208. See Art. 207; *Suc. of Fortier*, 51 La. An. 1585.

Art. 209. Same as Art. 208.

Between heirs acknowledged as required by Art. 209 and collateral heirs not acknowledged at all, the Court holds that the former are entitled to inherit. *Bourriaque et al. vs. Charles*, 107 La. 217 (31 Sou. 757).

Art. 212.

The child referred to in Act 71, p. 94, of 1884, is a legitimate "child" and is not an illegitimate "child." The right under the language of the statute to sue for damages growing out of personal injury is inherited by the mother of the former, and not of the latter. *Lynch vs. Knoop*, 118 La. 611 (43 Sou. 252).

Refer to Arts. 256, 261.

Art. 213.

If the father and mother have lost the right to claim the child, a foundling, for themselves, *a fortiori* have they lost the right to represent the child in the matter of its adoption by a stranger. *Succession of Dupre*, 116 La. 1092 (41 Sou. 324).

Art. 214. See *Hodges' Heirs vs. Kell*, 125 La. 100; also, *Succession of Baker*, 129 La. 88.

Under the terms of the act of the Legislature of the year 1862 (Act 64, p. 48), the person adopted has the capacity to inherit in preference to all collateral heirs.

The adopted child shall have the capacity to inherit in preference to all others save forced heirs. *Cunningham et al. vs. Lawson et al.*, 111 La. 1024 (36 Sou. 107).

Act 31 of 1872, p. 79, applies only to the adoption of minors, has no repealing clause, and did not abrogate the provisions of Art. 214, C. C., relative to the adoption of adults. *Succession of Caldwell*, 114 La. 195 (38 Sou. 140).

The notarial act adopting the child does not have the effect of repealing the law and of investing an aunt with the right of the tutorship. *In re Brown*, 120 La. 50 (44 Sou. 919).

The right granted in Art. 2315 of the Civil Code to the surviving father or mother to recover damages for the death of their son is a right granted to the actual father or mother

of the child, and not an adopting parent. *Mount vs. Tremont Lbr. Co.*, 121 La. 64 (46 Sou. 103).

It being admitted that the adopted children now before the Court were not related by blood to the person from whom they inherit, they are neither descendants nor collaterals; and, as they inherit under the law, they are not strangers to the estate; from which it follows that, if the inheritance falling to them is liable to taxation under Act 45, p. 102, of 1904, and Act 109, p. 173, of 1906, it must be as an inheritance falling to persons who by law are given the status of descendants; and, as thus classified, it is not liable to the tax, because it is of less value than ten thousand dollars. *Succession of Frigalo et ux.*, 123 La. 71 (48 Sou. 652).

Plaintiffs, the collateral heirs of Hodges, contest the legality of an act by which he adopted two of his illegitimate colored children. The power of Hodges at the time of the conception of the children to have formally acknowledged or to have legitimated them is the test to be applied to ascertain whether the act of adoption was legal. There was no legal impediment existing in this case at the time of the conception of the children to Hodges acknowledging or legitimating them. The judgment appealed from is therefore affirmed. *Hodges' Heirs vs. Kell*, 125 La. 87 (57 Sou. 77).

Art. 216. See Art. 166.

The husband, having obtained judgment of final divorce awarding him the unconditional custody of the minor children of the marriage, is without legal capacity to abdicate his trust by a subsequent agreement with his divorced wife; and such an agreement, purporting to vest in her the temporary or conditional custody of the children, cannot operate as a bar to his recovering possession of them. *Farr vs. Emuy*, 121 La. 91 (56 Sou. 112).

Refer to Arts. 217, 218, 301.

Art. 217. See Arts. 216, 166.

Art. 218. See Arts. 216, 166.

Art. 219. See Art. 166.

Art. 220. See Art. 166.

Art. 222.

It is necessary to get the authorization of the Court for the wife to proceed against the husband in the capacity of tutor. *Hecker vs. Brown*, 104 La. 524 (29 Sou. 232).

Under Art. 222 of the Civil Code, authorizing the appointment for a minor of an undertutor *ad hoc* when, both parents being alive, there is no tutorship, and yet some step has to be taken in the interest of the minor in the disposition of its property, an appointment of an undertutor *ad hoc* is proper in a suit for partition of property in which minors have an interest, though their father is dead; their mother being alive, and no tutor having been appointed. *Blandin et al. vs. Blandin*, 126 La. 819 (53 Sou. 15).

Art. 223.

We will add that this article (1477) embraces both father and mother, and that evidently it refers to Art. 223 of the Civil Code, and it does not refer to Art. 916, which embraces mothers or fathers as entitled to the usufruct. *Reems vs. Dielmann*, 111 La. 99 (35 Sou. 473).

But they have fallen into an error. It is true that the parents have the usufruct of the estates of their children during the minority of the latter, subject to the obligations imposed by law upon usufructuaries, and to the further obligation of maintaining and educating the children according to their station in life. *Bourg vs. Brownell-Drews Lumber Co.*, 120 La. 1027 (45 Sou. 972).

Refer to Arts. 224, 226, 229, 1477.

Art. 224. See Art. 223.**Art. 226. See Art. 223.****Art. 227.**

A parent's obligation to support his child arises from the fact of paternity, as provided by Art. 227 of the Civil Code, and is not, therefore, dissolved by a divorce and assignment of the custody of the child to the wife. *State vs. Seghers*, 124 La. 115 (49 Sou. 998).

Refer to Art. 239.

Art. 229. See Art. 223.

That it was against the policy of the State that husbands and wives should be heard complaining of one another during marriage. Writ of *habeas corpus* by father

for minor child denied. *State ex rel. Lasserre vs. Michel et al.*, 105 La. 744 (30 Sou. 122).

Art. 231.

The wife obtained judgment of divorce awarding her the custody of four minor children, issue of the marriage, and, she and they being without means, alimony at the rate of \$40 per month is not out of proportion to the wants of the minors, or to the circumstances of the father, when it appears that the latter is employed at an annual salary of \$1,800 and board, for which he works about six months in the year, and that he has no one else dependent upon him for support. *Hanagriffe vs. Hanagriffe*, 122 La. 1012 (48 Sou. 488).

Refer to Art. 233.

Art. 233. See Art. 231.

Art. 235.

The authority is conferred upon the father and mother jointly when they are both present; and it stands to reason that the mother should be authorized to act separately and alone in case the father has disappeared. *Williams vs. Pope Mfg. Co.*, 52 La. An. 1444 (27 Sou. 851).

Art. 236. See Art. 235.

Art. 238. See Succession of Baker, 129 La. 79.

Art. 239. See Art. 227.

Art. 246. See Art. 166.

Art. 250. See Art. 166.

Art. 251.

Notwithstanding the surviving widow in community has, under our law, a legal usufruct upon the undivided share of the heirs in the property of the succession of the deceased, she is not entitled to take possession of such property, and enjoy the fruits and revenues thereof, until she shall have caused an inventory and appraisement to be made of such property, and an abstract of said inventory to be registered in the book of mortgages in the parish in which the property is situated. This is a condition precedent imposed by our law upon the exercise of the legal

usufruct of the surviving spouse. *Succession of Landier*, 51 La. An. 968 (25 Sou. 938).

Refer to Arts. 253, 321, 3350, 3351, 3356.

Art. 253. See Art. 251.

Whether the mother, after having accepted the tutorship of a child, may resign it, *quaere?* But she cannot do so after she has remarried and been retained in the tutorship with her husband as co-tutor. *In re Minors Long*, 118 La. 689 (43 Sou. 279).

Though, under Art. 253 of the Civil Code, declaring the mother of minors, their father being dead, "bound to fill the duties of a tutor until she has caused a tutor to be appointed," it is doubtful whether she could proceed alone against her minor children, through the appointment of a tutor *ad hoc*, for partition of property, such an appointment may be made in such a suit by the mother and her major child against the minors; the right of the major child to demand a partition being unquestionable. *Blandin et al. vs. Blandin*, 126 La. 820 (53 Sou. 15).

The father must accept the tutorship. *Succession of Watt*, 111 La. 938 (36 Sou. 31).

Art. 254.

A tutrix vacates her trust by the fact of remarriage without complying with the requirements of Art. 254 of the Civil Code. But this vacation of the office of tutrix does not have the effect of also vacating the office of undertutor. *Succession of Marinovich*, 105 La. 110 (29 Sou. 500).

The natural tutrix who, in contemplation of a second marriage, causes a family meeting to be convened for the purpose of deciding whether she shall retain the tutorship, does not *ipso facto* forfeit her office by failing to have the proceedings of such family meeting homologated by failing to have the evidence of the minor's mortgage recorded against the prospective co-tutor before the celebration of the marriage. *Barbin vs. Schwartenberg et al.*, 110 La. 467 (34 Sou. 606).

A favorable action by a family meeting is indispensable to the retention, as tutrix, of a mother in the event of her marrying again; but such action, whether favorable or unfavorable, is subject to review by the Courts. *Succession of Scarbajal*, 111 La. 945 (36 Sou. 41).

In March, 1908, the Widow Supple married Joseph B. Murray without previously provoking a family meeting to advise as to her retention of the tutorship. Her neglect to call such meeting *ipso facto* deprived her of the tutorship. *In re Supple Minors for Family Meeting*, 123 La. 940 (49 Sou. 648).

Refer to Art. 255.

Art. 255. See Art. 254, 110 La. 468.

Art. 256. See Art. 212, 118 La. 616.

Art. 261. See Art. 212.

Art. 264.

Where the paternal grandfather and the maternal grandmother of an orphan minor is each claiming the tutorship, the mere fact that the grandfather resides in another State, to which he proposes to remove the minor, affords no reason for denying him the preference according to law; and, it appearing that he is likely to do at least as well for the minor as the grandmother, the tutorship must be awarded to him. *Succession of Oliver*, 113 La. 877 (37 Sou. 862).

Refer to Arts. 302, 303.

Art. 275.

The undertutor is nowhere prohibited from buying property in which the minor may be directly or eventually interested. *Brown vs. Krause & Managan Lbr. Co.*, 125 La. 709 (51 Sou. 693).

Where the questions were whether a debt was due in whole by a widow, who acted as tutrix for her minor children, or was due in part by her and in part by the children, and involved the displacing of a legal mortgage of the children from the property of the widow, so as to subordinate it to the other mortgages given by her, the interest of the widow and children were opposed, so that the widow could not act for or represent the children in the litigation. *Boudreaux vs. Lower Terrebonne Refining & Mfg. Co.*, 127 La. 99 (53 Sou. 456).

Refer to Arts. 276, 278.

Art. 276. See Art. 275, 125 La. 709; Tobin vs. U. S. Safe Deposit & Savings Bank, 115 La. 359.

When, however, some eight months following the marriage, the former widow and her husband took proceedings for the reappointment of herself as tutrix, it was not only the right, but the duty, of the undertutor, if he thought the interests of the minor so required, to oppose her appointment and that of the new husband as co-tutor. (C. C., Arts. 276, 277.) *Succession of Marinovich*, 105 La. 110 (29 Sou. 500).

An undertutor may be appointed, though there be a vacancy in the office of tutor; and, when so appointed, cannot be removed without cause, or upon charges which are not sustained. Where there is an undertutor competent to act, under the direction of the Court, the appointment of a tutor *ad hoc* to take proceedings looking to the appointment of a tutor, upon the assumption that there is a vacancy in the tutorship, is unauthorized. (C. C., Arts. 276, 279.) *Barbin vs. Schwartzenberg*, 110 La. 467 (34 Sou. 606).

The family meeting as held was illegal because, among other things, the minors were not represented by an undertutor; and that defect was not cured by the subsequent appointment of the husband of one of the major plaintiffs in the suit to that position, and the homologation, *nunc pro tunc*, of the proceedings at his instance. *Ducet vs. Fenelon*, 120 La. 41 (45 Sou. 370).

Refer to Arts. 277, 279.

Art. 277. See Art. 276, 105 La. 110.

The opposition of an uncle of the minors, who is not a member of the family meeting, opposing the homologation of the deliberations of said meeting, if well founded, will be cause for the District Judge declining to homologate the proceedings. *Succession of Carbajal*, 111 La. 949 (36 Sou. 41).

Art. 278. See Art. 275, 125 La. 709.

Art. 279. See Art. 276.

Art. 281. See Arts. 282, 286, 287; Succession of Fried, 106 La. 276.

It is null in that it was composed entirely of friends of the minors when the fact was and is that several brothers of age of the minors resided in the parish. These were not named as members in the order, were not asked to become members, were not notified to attend the meeting, and were not present at the meeting. *Succession of Marinovich*, 105 La. 111 (29 Sou. 500).

The words "at least" apply to all family meetings, and cannot be held to mean "neither more nor less than five." The authority of the Judge to determine the maximum number of members of which a meeting is to be composed can in no case be interfered with; and, having determined the number at not less than five, he must appoint relations, if they are to be found and are eligible; or, if they are not to be found, may complete the number so determined by the appointment of friends. *Succession of Carbajal*, 111 La. 945 (36 Sou. 41).

Strangers are not called in a family meeting, but a brother-in-law must be called before a friend, or even an uncle or first cousin. (Arts. 281, 282.) *Succession of Baker*, 129 La. 79 (55 Sou. 714).

Refer to Arts. 282, 286, 287.

Art. 282. See Art. 281, 105 La. 111, and 129 La. 79.

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Art. 283.

One who is a co-heir has no legal objection to be a member of a family meeting. *Succession of Fried*, 106 La. 279.

We do not think that the interests of the uncle and the brother were in conflict with those of the minor. The sale

was not to be made to either one or both of them, but to a third person, in whom neither they nor the minor had any interest. Their interests, so far from being adverse, were wholly harmonious with those of the minor; what benefited her benefited them. *Carrollton Land & Imp. Co. vs. Eureka Homestead Soc.*, 119 La. 702 (44 Sou. 435).

Art. 284.

Any irregularity there may be in an order of Court leaving it to the discretion of the notary to take any five out of nine persons appointed to compose any family meeting is cured by the act of the notary in calling to the meeting all nine of the persons appointed, and thus not exercising the discretion delegated to him. *Succession of Carbajal*, 111 La. 944 (36 Sou. 41).

Art. 286. See Art. 281, 105 La. 111.

Art. 287. See Art. 281, 105 La. 111.

Art. 291.

Upon any question required by law to be submitted to the family meeting, it is obviously as necessary that the meeting should act as that it should assemble and deliberate; and, such action being necessary, the decision of the Judge without it would be unauthorized. To hold, however, that a family meeting convoked in the interest of a minor is, under all circumstances, to be dominated by his relations, or that its action is not subject to review, would be to assume that the lawmaker has overlooked the possibility that relations may be incompetent or unfriendly. *Succession of Carbajal*, 111 La. 957 (36 Sou. 41).

Art. 300.

Dealing with the question of the capacity of the parties litigant, it is evident that the nullity charged against the marriage is relative, and not absolute; from which it follows that, until said marriage is annulled by a judgment of a competent Court, the contracting parties occupy the status of minors emancipated by marriage. *Delpit et al. vs. Young*, 51 La. An. 926 (25 Sou. 547).

Refer to Art. 362.

Art. 301. See Art. 216, 121 La. 93.

The father cannot be excused from the obligation of accepting the utorship of his own children. (C. C., Art. 301.) He cannot abdicate his tutorship and permit another person to be appointed tutor. Such an appointment is null. *Succession of Watt*, 111 La. 937 (36 Sou. 31).

The prescription of three years established by Art. 233 of the Constitution against actions to annul tax titles applies to an action brought on behalf of a minor, notwithstanding that the minor may have been provided with a tutor, and, hence, may not have received notice of the intention to sell the property; his recourse being upon those whose duty it was to see that he was provided with a tutor. *Doyle vs. Negrotto*, 124 La. 100 (49 Sou. 992).

Refer to Arts. 313, 337, 1023, 3541, 3543.

Art. 302. See Art. 264, 113 La. 878.

That he suffers from an incurable disease—cancer of the face—is unable to walk owing to an injury received about a year ago, and requires constant care, attention and nursing, is a good cause why he cannot be the tutor of a child five years old. *Brinkhaus vs. Pavy et al.*, 51 La. An. 1325 (26 Sou. 276).

Art. 303. See Art. 264, 113 La. 878; Arts. 1838, 404, 113 La. 905.

Article 303 of the Civil Code, excluding from the tutorship those who have failed to cause an inventory to be made within the time prescribed by law, does not apply to a case where the property of a minor consists of jewelry of small value, and the person sought to be excluded did not know of its existence as belonging to the minor. *Succession of Burrell*, 118 La. 1076 (43 Sou. 882).

Art. 304.

It has become *stare decisis* that the recognition by the Judge of a tutor by nature, permitting him to qualify as such and issuing to him letters of tutorship, even though there was failure to record the abstract of inventory, are not absolute nullities. Certainly so as to third persons, who meanwhile have acquired rights on the fact of such recognition by the Judge. *McCoy's Heirs vs. Dearbonne et al.*, 109 La. 310 (38 Sou. 326).

Refer to Arts. 321, 3370.

Art. 305.

A two-year-old boy was taken charge of by his grandmother after his mother's death, and was afterwards removed to the home of a friend of his uncle by the latter, and on the assurance that she would care for the child. The father consented to leave him with her, and she cared for the child, sent him to school, etc., for nearly seven years, and the father, if given the child's tutorship, would leave him with her. The father occasionally visited the child, and sent him small presents. *Held*, the father had not abandoned the child within Art. 305 of the Civil Code. *In re Alexander*, 127 La. 853 (54 Sou. 125).

Art. 307. See C. P., Art. 1059.

It having come to the knowledge of the trial Judge that circumstances exist which made the appointment of a tutor to the minors necessary, his action in ordering the convocation of a family meeting of the relations of the minors to recommend a tutor was eminently proper; and this without regard to whether or not this relief was specially asked on their behalf. (Arts. 307, 312.) *Succession of Marinovich*, 105 La. 111 (29 Sou. 500).

Refer to Art. 312.

Art. 310. See Doyle vs. Negrotto, 124 La. 103.**Art. 312. See Art. 307, 105 La. 111.****Art. 313. See Art. 301, 124 La. 113.**

Where a minor is not represented by a tutor or guardian, notice of tax delinquency should be served on a tutor *ad hoc* appointed for that purpose. *In re Interstate Land Co., Ltd.*, 118 La. 587 (43 Sou. 173).

Art. 315.

When the undertutor died, his official connection with the appeal died; but his opposition, none the less, remains standing. His successor could, of course, decline to prosecute the appeal, or join with the appellee in resisting the opposition; but his doing so would not carry with it, as a result, the failure of the appeal of the other opposing members of the family meeting. *Succession of Carbalal*, 111 La. 951 (36 Sou. 43).

Art. 316. See Succession of Desina, 118 La. 282.

Art. 321. See Art. 251, 51 La. An. 971; also, Art. 304.

Clerical errors in writing the name of a man really appointed undertutor of minors held not to vitiate the appointment. *McCoy Heirs vs. Dearbonne et al.*, 109 La. 310 (33 Sou. 326).

Where minors inherit from their mother a paraphernal claim against the community, and their father qualifies as their tutor, the legal mortgage resulting therefrom in their favor does not absorb their claim as community creditors and alter the character of that from one due by the community to one due by the tutor. *Scovel vs. Levy's Heirs*, 118 La. 983 (43 Sou. 642).

Art. 322.

The effect of the registry laws is not so potent as to necessarily vest in a minor a legal mortgage on certain property, standing on the records in the name of his natural tutor, when, in point of fact, it had never belonged to him, had not assumed ownership over it, but had, *ab initio*, in the only instrument connecting him with the title, recognized the property to belong to another person. *Succession of Manson*, 51 La. An. 130 (25 Sou. 639).

Refer to Arts. 2239, 3314.

Art. 325.

Where all the rights of minors have been liquidated by a judgment of the Court, the minors' legal mortgage and the special mortgage reserved to them under Art. 343 of the Civil Code may be restricted by one and the same special mortgage to particular immovables sufficient in value to secure the amount due, with interest to accrue, as provided by Art. 325 of the Civil Code. *Riley vs. Heuer et al.*, 127 La. 118 (53 Sou. 463).

Art. 334. See Doyle vs. Negrotto, 124 La. 103.

Refer to Art. 343.

Art. 336.

An adjudicatee of real estate sold at the instance of a tutor administering a succession is not bound to accept title where it appears that the order was obtained and the sale made without the advice of a family meeting. Nor does it

affect the question that a family meeting is subsequently convened and ratifies the sale as made. No obligation having been imposed on the adjudicatee by the adjudication, a contract cannot thereafter be forced on him at the option of the vendor of the property. *Succession of Yaruszky*, 52 La. An. 1913 (28 Sou. 328).

Refer to Arts. 337, 339, 340, 1155, 1156.

Art. 337. See Art. 336, 52 La. An. 1915; Succession of Keppel, 113 La. 256; see Art. 301, 124 La. 103.

If the undertutor undertakes to administer the affairs of a succession under a power of attorney from the tutor, he will, as between himself and the minor, be held to the obligation of a *negotiorum gestor*, and to a direct liability to the minor. *Eby et al. vs. McLain et al.*, 123 La. 138 (48 Sou. 772).

The legal inference from the allegation that property which was sold more than forty years ago in a succession is that the property was sold to pay debts; and in such case a family meeting convened to advise with reference to the interest of a minor heir could neither promote the sale nor prevent it; and the discharge by the undertutor of the minor of his functions at such family meeting would not of itself have disqualified him from becoming the purchaser of the property. *Smith vs. Krause & Managan Lbr. Co.*, 125 La. 704 (51 Sou. 693).

Refer to Art. 1790.

Art. 338. See Fahey vs. Fahey, 128 La. 511.

Art. 339. See Art. 336, 52 La. An. 1915.

Even if the wife had been regularly appointed as curatrix, she had no more power to compromise respecting the rights of the interdict, or to confess judgment in his behalf, than a tutor of a minor under like circumstances. The immovable property of an interdict, like that of a minor, cannot be alienated except by sale at public auction under a decree of a competent Court rendered on the advice of a family meeting. *Sallier vs. St. Louis, W. & G. Ry. Co.*, 114 La. 1093 (38 Sou. 968).

Refer to Arts. 341, 343.

Art. 340. See Art. 336, 52 La. 915, and 114 La. 1093.

Where the compromise of a suit instituted by the tutor was authorized by a family meeting and judgment of the

Court, the advice of the meeting and the order that the property be sold at private sale to effect a partition are mere surplusage, as the compromise, *ipso facto*, destituted the interests of the minors; and in such a case the private sale of the property will be considered merely as evidence of the execution of the compromise agreement. *Holliday vs. Hammond State Bank*, 118 La. 1001 (43 Sou. 656).

Refer to Arts. 353, 3071.

Art. 341. See *Fahey vs. Fahey*, 128 La. 511; **see Art. 339, 114 La. 1093.**

The word "revenues" in the first paragraph of Art. 341 is to be taken as synonymous with the word "funds" in the second paragraph of the same article, and as meaning all moneys belonging to the minor that come into the hands of the tutor in the course of administration. *Tutorship of Minor Heirs of Watson*, 51 La. An. 1644 (26 Sou. 409).

A private sale of minors' property by their tutor to pay debts is void; and it is none the less so because a family meeting advised it and the Judge homologated the proceedings of the meeting. *Blair vs. Dwyer*, 110 La. 332 (34 Sou. 464).

It is only in case where the purpose is to effect a partition by the sale of the whole property that the interest of an interdict can be alienated at private sale; otherwise, such interest must be sold at public auction. *Gallagher vs. Lurges et al.*, 116 La. 755 (41 Sou. 60).

The property of the minor cannot be sold at a private sale to pay debts, although it may be sold at a private sale to effect a partition under the authority of a statute. When sold at a private sale to pay debts, such sale is null. *Gremillion et al. vs. Roy et al.*, 125 La. 524 (51 Sou. 576).

Under Article 341 of the Civil Code, providing that the sale of property of a minor shall be authorized by the Judge and made at public auction, after having been duly advertised in the manner required for other judicial advertisements, during ten days for movables and thirty days for immoveables, the tutor of a minor had no power to convey the minor's interest in certain land to attorneys employed to redeem the same, notwithstanding Act 124 of 1906, creating a special privilege in favor of lawyers for

their fees on judgment obtained by them. *Keel et al. vs. Sutherlin et al.*, 130 La. — (57 Sou. 794).

Refer to Art. 1323.

Art. 343. See Art. 339, 114 La. 1093, 949; See Sharp vs. Zeller, 110 La. 67; see Art. 325, 127 La. 118.

Article 343 was amended by Act 50 of 1900, p. 83, to read as follows: Whenever the father or mother of a minor has property in common with him, they each can cause it to be adjudicated to them, either in whole or in part, at the price of an estimation made by experts appointed by the Judge and duly sworn, after a family meeting, duly assembled, shall have declared that the adjudication is for the interest of the minor, and the undertor shall have given his consent thereto; and in this case the property so adjudicated shall remain specially mortgaged for the security of the payment of the price of adjudication and the interest thereto.

To constitute an adjudication of property owned in indivision between a father and his minor children to the former, something more is required than the recommendation of a family meeting that the adjudication be made than the appraisement of the property by experts, and than an order of the Court homologating and approving the proceedings of the family meeting. These are proper and necessary, as far as they go; but, in addition, there must be a judgment, or decree of Court, formally adjudicating the property to him; and this judgment, or an act of adjudication based upon the same, must be recorded in the mortgage records. *Succession of Burguières*, 104 La. 46 (28 Sou. 883).

Where a surviving parent holding property in common with a minor child desires to have a particular part of the common property adjudicated to her, she must have not only the interest of the minor in that property adjudicated, but that interest together with the parent's. *Lyons vs. Woman's League of New Orleans*, 124 La. 222 (50 Sou. 18).

Where a widow owned a half interest in land as survivor in community and one-sixth as legatee of her husband, subject to the condition of non-remarriage, and her minor children were the owners of the remaining two-sixths, an adjudication of their interest to her under Art. 343 does

not give the widow title to the contingent interest of the minors in the interest willed to her where the adjudication did not purport to deal with such interest and no price was set therefor. *Craft vs. Leibe*, 129 La. 552 (56 Sou. 505).

Refer to Arts. 1753, 2443.

Art. 344.

The purpose of Art. 344 is to enable the parent to have the rights of the minor liquidated, and to secure them by a special mortgage on immovables. *Riley vs. Heuer*, 127 La. 118 (53 Sou. 463).

The failure to record in the mortgage book a judgment of adjudication of common property to a surviving parent is cured by a substitution of a special mortgage. *Brewer vs. Wright*, 130 La. —— (58 Sou. 160).

Art. 345.

Before a licitation can be ordered, the Court has to determine that the property cannot be conveniently divided in kind. *Chaffee vs. Minden Lumber Co.*, 118 La. 756 (43 Sou. 397).

Where minors are sued for the partition of property, which is shown to be indivisible in kind, the Judge may order it to be sold for cash without the advice of a family meeting, and without regard to the appraisement. *Doucet vs. Fenelon*, 120 La. 40 (44 Sou. 912).

Refer to Arts. 1814, 1839.

Art. 346.

Property belonging to a minor, and existing in kind at his majority, found in the possession of a third person, can be recovered by him, with the fruits and revenues, in a direct action against the person in possession. Neither he nor the tutor can limit the remedy of the minor to an action inside of the tutorship for the value of the property. *Eby vs. McClain*, 123 La. 138 (48 Sou. 772).

Art. 347.

A tutor who, acting upon his own authority, accepts, upon a good claim, less than the amount due his ward, is liable for the difference. *Succession of Emonot*, 109 La. 359 (35 Sou. 368).

Refer to Arts. 343, 353, 3072.

Art. 348. See Art. 347; Suc. of Buddig, 108 La. 409.

A father, though he be not tutor of his children, has the right, if they have no tutor, to take the necessary steps for the preservation of their property. Though he be not authorized to receive moneys belonging to them, he may cause said moneys to be brought into court, and provoke their investment in real estate, or a loan of them on a mortgage, to be made by order of the Court rendered on the advice of a family meeting held in the presence of the undertutor. *Varnado vs. Lewis*, 113 La. 72 (36 Sou. 893).

Art. 350.

A family meeting should be held, and the approval of the Court obtained, in order that an amount in excess of revenues may be legally expended, and charged to the interdict, for the support of the interdict. *Succession of Sangfried*, 114 La. 879 (38 Sou. 593).

The tutor must support, maintain and educate the minor, "according to his condition and his fortune," out of his revenues; and the minor can collect from his tutor only the excess of his revenues over the amount expended therefrom for his maintenance and education. This balance can only be ascertained by an accounting. *Eby vs. McCain*, 123 La. 157 (48 Sou. 779).

Where the tutor's expenses towards the support of a minor exceed her revenues, and no family meeting recommended the expenses, and the minor, arrived at her majority, refuses to recognize the amount as due, he is not entitled to any credit for the amount in excess of the revenues.

The tutor is liable for interest on all sums of money of his ward which came into his hands. *Tutorship of Minor Heirs of Watson*, 51 La. An. 1641 (26 Sou. 409).

Art. 351. See Eby vs. McLain, 123 La. 157.**Art. 353. See Art. 347; Lyons vs. Lawrence, 118 La. 463; see Art. 340, 118 La. 1004.**

The tutor cannot purchase for the minor immovable property without the authority from the Judge, granted on the advice of a family meeting. And the jurisprudence is that such a purchase without authority is at the tutor's risk. *Smith's Heirs vs. Johnston*, 110 La. 564 (34 Sou. 680).

Even if the wife had been regularly appointed as curatrix, she had no more power to compromise respecting the rights of the interdict, or to confess judgment in his behalf, than a tutor of a minor under like circumstances. *Sallier vs. St. Louis, W. & G. Ry. Co.*, 114 La. 1093 (38 Sou. 868).

Refer to Art. 415.

Art. 356. Widow and Heirs of Willis vs. Berry et al., 104 La. 115; **see Art. 357, 117 La. 379.**

The acts of the tutrix and co-tutor administering the estate are binding upon the non-opposing creditors. There still remains the right to the minors to inquire into the accounting. *Succession of Guillebert*, 126 La. 993 (53 Sou. 117).

Art. 357.

During his life the dative tutor owes such accounts as the law requires him to render to the Court by which he has been appointed; but after his death any accounts due by him to his wards become a debt of the succession, and must be there recovered; or, if there be a universal legatee in possession, from him; but the legatee owes no account as tutor. The account between a former tutor, or his succession, and the new tutor is not to be held open until the minor, perhaps of tender years, arrives at the age of majority. *Succession of Begue*, 112 La. 1046 (36 Sou. 852).

The minor is entitled on reaching majority to rule the tutor to a final account, which should be full and complete, covering the entire period of the tutorship, supported by vouchers, which account the minor has at that time the right to question, and to sustain by appeal on the whole account. He is entitled at that time to only one single account and one single appeal. *Succession of Guillebert*, 117 La. 379 (41 Sou. 654).

Refer to Arts. 356, 361.

Art. 361. **See Art. 357, 117 La. 379.**

Art. 362. **See Art. 300, 51 La. An. 920;** **see Rhodes vs. Cooper et al.**, 113 La. 600.

A minor on reaching majority is required to have recourse to an action for an account to have recognized and

enforced a claim against his father for moneys of his received by his father during the tutorship, but not for a claim for a debt due to his mother transmitted to the minor by inheritance from her for paraphernal funds received by the husband and converted to his own use during the marriage. The prescription of four years provided by Art. 362 applies to claims of the former, but not of the latter, character. *Succession of Kidd*, 51 La. An. 1157 (26 Sou. 74).

Art. 363.

The next ground, as stated by plaintiff, that, where a mother resides and dies in Texas, leaving lands in this State, and as her only heir a minor child in Texas, where the father is qualified as guardian there, but never recognized as tutor here, under Art. 363, and the heir has never been put in possession, the property ought to be assessed in the name of the estate of the mother as the owner. The assessment in the name of the father is null. The assessment must be made in the name of the owner.

We can only say in answer: the name of the owner of the property is descriptive; a tax sale may be made and acquire validity in time, although there is an irregularity in this respect. We must say that assessment in the name of the tutor, as plaintiff contends should have been done, would not have been any more in the name of the owner than it was when assessed in the name of the tutor. *Boyle, Tutor, vs. West et al.*, 107 La. 353 (31 Sou. 794).

A foreign guardian failed to ask for the needful authorization of a family meeting to authorize a suit by the minor for a partition. The property was sold. The purchaser has the right, under Art. 1788, to have the sale ratified by a family meeting, and thereby cure this defect. *MacRae vs. Smith*, 112 La. 715 (36 Sou. 659).

In 1870 this section was incorporated in the Civil Code as Art. 363; and, as no change was made in its language, it is to be presumed that it was intended to bear the interpretation that the guardian of the minor domiciled in a foreign country, where the laws are similar to our own, should continue to be recognized here on proof of appointment under the law of the domicile, and without further confirmation or qualification. *Curtis vs. Union Homestead Assn.*, 126 La. 960 (53 Sou. 63).

Art. 382.

Amended by Act 224, 1908, p. 341, to read as follows: The minor emancipated by marriage does not need the assistance of a curator in any act or proceeding; provided that, whenever a minor emancipated by marriage shall reach the age of eighteen years, the said minor shall be relieved from all disabilities which attach to minors, and with full power to do and perform all acts as fully as if the said minor had arrived at the age of twenty-one years.

Art. 387. See Art. 166, 52 La. An. 677.

Art. 389.

Where the petitioner alleges that he is a half-brother of a person named, that such person is over the age of majority, and is subject to an habitual state of insanity, that he has never been interdicted, but that another person named has been appointed curator, and that such appointment is void, and should be rescinded, and the petition concludes with a prayer for the citation of the person sought to be interdicted, for judgment of interdiction, and for the appointment of a curator and undercurator, the petition discloses a cause of action. *In re Bell*, 129 La. 26 (55 Sou. 697).

Refer to Arts. 390, 391, 404, 406.

Art. 390. See Art. 389.

Art. 391. See Suc. of Baker, 129 La. 80; see Art. 389.

The responsibility and service of counsel appointed by the Court for defendant in proceedings for her interdiction are not any less than those of counsel for plaintiff; and an allowance to defendant's counsel equivalent to the amount charged by plaintiff's counsel is a reasonable allowance. *Interdiction of Hellwege*, 128 La. 1024 (55 Sou. 1024).

Art. 395. See Succession of Drysdale, 122 La. 41.

Article 404 of the Civil Code is not necessarily in conflict with Art. 395 of the Civil Code, and is not with Art. 580 of the Code of Practice. *In re Jones*, 116 La. 776 (41 Sou. 89).

As the law provides that the judgment relating to the nomination of a curator of a person interdicted shall be

executed provisionally, it follows that a judgment upon the question of the recusation *vel non* of the Judge to whom the question of the nomination is presented must fall under the same rule, and, hence, that a suspensive appeal does not lie from such a judgment. 116 La. 1017 (41 Sou. 230).

Refer to Art. 404.

Art. 396.

In that the Constitution has provided the method of taking evidence in the Supreme Court, Art. 396 is a dead-letter law in that respect. *Bland et al. vs. Edwards*, 52 La. An. 824 (27 Sou. 289).

Art. 397.

Costs incurred during a marriage in interdiction proceedings directed against the husband, which proceedings resulted in his interdiction, are, as a rule (with some exceptions and modifications), a debt of the community. The community of acquests and gains is not dissolved by the interdiction of the husband. *Succession of Bothick*, 52 La. An. 1864 (28 Sou. 458).

The fee of the attorney of the wife who has successfully prosecuted to judgment a suit for separation from bed and board and separation of property from her husband is a just and valid charge against the community, and may be recovered on a *quantum meruit*. Article 397 is a general exception to this rule. *Benedict et al. vs. Holmes*, 104 La. 528 (29 Sou. 256).

Refer to Arts. 2408, 2409.

Art. 400.

Had judicial proceedings for interdiction been in fact taken out, the legal effect attached to them by reason of their having been resorted to (Arts. 400, 401) would, under paragraph 12 of Art. 1788 of the Civil Code, have ceased on their abandonment. *Embry vs. Jackson Parish Bank*, 125 La. 116 (51 Sou. 87).

Refer to Art. 401.

Art. 401. See Art. 400.

Art. 402. See Heard vs. Blanks, 125 La. 111.

An act done by a party prior to the petition for his or her interdiction cannot be annulled except upon proof that

the cause of such interdiction notoriously existed at the time when the act was done, or that the person who dealt with the party of unsound mind could not have been deceived as to the state of his mind. *Wolf vs. Edwards*, 106 La. 477 (31 Sou. 58).

Refer to Art. 1788.

Art. 404. See Arts. 395, 389.

The District Judge, on the removal of a curator of an interdict from his office by judgment of his court, has the power to appoint someone to take care temporarily of the interdict, and do all conservatory acts necessary for the protection of her property, subject to the revocation by him of the appointment. The law has not affixed any particular designation to the person so to be appointed. The term "provisional curator" as fitly applies as any other; the powers or the person, rather than his title, being the matter requiring consideration. The Judge is required however, at the instance of the undercurator, to convoke a family meeting to recommend a fit and competent person to appointment as permanent curator to replace the removed curator. *State vs. King*, 113 La. 905 (37 Sou. 871).

Art. 406. See Art. 389.

Art. 413.

The wife, when appointed curatrix of her husband, is not bound to give security; but she cannot be so appointed except on a recommendation of a family meeting. *Sallier vs. St. Louis, W. & G. Ry. Co.*, 114 La. 1093 (38 Sou. 868).

Art. 415. See Succession of Sang Fried, 114 La. 882; Gallagher vs. Larges, 116 La. 758; also, see Art. 353, 114 La. 1093.

The person of the interdict is like the minor under a tutor. The rules governing in matter of the interest of each are very similar. (C. C. 415). In emergency, the probate Court may appoint a curator *ad hoc* or a special curator to represent a minor or interdict. *Sallier, Curator, vs. Rosteet et al.*, 108 La. 381 (32 Sou. 383).

Art. 427.

It is in court to procure the decree annulling the pretended charter of the corporation. The proceeding is by

the Attorney-General, authorizing suit by him "when any association or number of persons shall act within this State as a corporation without being duly incorporated" (R. S., Sec. 2593, par. 3); or, if the suit is to be viewed as seeking the forfeiture of a subsisting charter for violation of its conditions or abuse of its privileges, then the decree of forfeiture is the object the suit is to accomplish. *State ex rel. Columbia Debenture Co., Ltd., vs. Judge*, 51 La. An. 467 (25 Sou. 65).

The City of Carouge is a political corporation, such a one as is defined by our Code as an intellectual body. It is a college of inhabitants, the members of which succeed each other, so that the party continued always the same, notwithstanding the change of the individuals which compose it, and which, for certain purposes, is considered as a natural person. *Succession of Meunier*, 52 La. An. 91 (26 Sou. 776).

The Sewerage and Water Board, having by the law of its creation been given a name, and the power to contract and to sue, and been charged with functions such as it, and not the individuals composing it, must exercise, and possessing to the letter the distinctive attributes as a corporation as specified in the Code, is held to be a body corporate. *State vs. Kohnke*, 109 La. 839 (33 Sou. 793).

The articles of the Civil Code and the different statutes on the subject of corporations treat them as separate persons in the law, not liable for the debts of individual stockholders. *Hardy vs. Pecot*, 113 La. 365 (36 Sou. 992).

Whether the city acted in a governmental or in a private character, still she acted as a corporation; and a corporation does not hold any mandate from its corporators to represent them individually in making contracts. *Allen & Curry Mfg. Co. vs. Shreveport Water Works Co.*, 113 La. 1096 (37 Sou. 980).

The language of Act No. 49 of 1908, p. 49, therefore, somewhat more exactly expresses the idea than the board in each parish is to elect a superintendent for a term of four years; and it can have no application to the individuals composing such boards at any particular time, since the boards are corporations, and a corporation is a body which continues always the same, notwithstanding the change of the individuals who compose it. 123 La. 740 (49 Sou. 490).

Refer to Arts. 429, 433, 436, 437.

Art. 428.

The right of individuals to organize themselves into a corporation is not an original, but is a derivative, right, expressly conferred by legislative authority. Throughout the whole legislation upon the subject, and behind it, has constantly rested a principle that corporations should be created "for the promotion of some object of public utility," and for none other. *State vs. Debenture Guarantee & Loan Co., Ltd.*, 51 La. An. 1874 (26 Sou. 600).

What is here said of corporate rights applies equally to the grant of public franchises and privileges and their acceptance. *Morgan's L. & T. R. & S. S. Co. vs. Railroad Commission*, 109 La. 261 (33 Sou. 214).

Art. 429. See Art. 427, 109 La. 843.

The grant of power to provide for a drainage system carries with it the power to determine what system shall be provided, and the exercise of that discretion cannot be judicially interfered with, or questioned, except where the power is exceeded, or fraud is imputed and shown, or there is a manifest invasion of private rights or gross abuse. *Parker vs. Mayor of Monroe*, 128 La. 957 (55 Sou. 587).

Art. 432.

Where the road in aid of whose construction a special tax has been voted is completed and in active operation, taxpayers cannot set up collaterally as a defense to paying the tax that there was a variance between the name of the corporation which constructed the road as given in the petition of taxpayers and its name as given in its charter; nor can they urge collaterally that the corporation was not legally constituted. The corporation was a *de facto* corporation. *James vs. Arkansas Sou. Ry. Co.*, 110 La. 146 (34 Sou. 337).

Refer to Art. 1901.

Art. 433. See Art. 427, 52 La. An. 91.

The City of Shreveport being without authority to make herself liable to her inhabitants for any losses suffered by them as a result of her negligent discharge of her duty to furnish water for the protection of their property against fire, she necessarily is likewise without authority to hire someone else to assume such a liability. Such assumption

of liability would have to be paid for out of the corporate treasury, and the city would only be doing indirectly what she could not do directly. *Allen & Currey Mfg. Co. vs. Shreveport Water Wks. Co.*, 113 La. 1093 (37 Sou. 980).

Art. 435.

No liability to damages in favor of her inhabitants or corporators lies upon a city for the non-performance or negligent performance of her duty to furnish water to her fire department for protecting the property within her corporate limits from fire. Hence, no duty rests upon her to impose such liability upon a contractor stepping into her shoes for performing such duty. *Allen & Currey Mfg. Co. vs. Shreveport Water Wks. Co.*, 113 La. 1092 (37 Sou. 980).

An officer or stockholder of a corporation which has been placed in the hands of a receiver can be named by the Court as an auctioneer to make a sale of the property; and, if so appointed, and he makes a sale, he is entitled to his commissions as any other person who would have rendered that service. *Friedrichs vs. Friedrichs, Young & Taney*, 126 La. 689 (52 Sou. 996).

Art. 436. See Art. 427, 113 La. 1097.

The stockholders are neither owners of the property of the corporation nor are they creditors of the corporation. The certificate of stock which they may hold does not represent any portion of its property, nor does it evidence any debt due to them by the bank. *Succession of Sinnot vs. Bank*, 105 La. 717 (30 Sou. 233).

Refer to Art. 437.

Art. 437. See Art. 436, 105 La. 717; Art. 427, 113 La. 1096.

If the defendants have not paid their subscriptions to stock, their obligation to pay them is to the corporation; and the party legally authorized to enforce that obligation is the corporation itself, through those who have the legal authority to represent it, and not the creditors. *Jones Company vs. Hoffman*, 114 La. 1001 (38 Sou. 763).

Art. 439.

A corporation is not liable in damages for the acts of its officer outside the scope of his employment. *Bright vs. Bell et al.*, 113 La. 810 (37 Sou. 764).

Art. 441.

Agency may be a business which Act No. 36 of 1888, p. 27, authorizes. The business of agency is lawful, and not under the ban of the law when properly conducted. *State vs. Miche*, 113 La. 5 (36 Sou. 869).

Art. 443.

This article evidently refers to crimes or offenses which it is impossible to reach and punish through the corporation itself, and does not apply to civil responsibility of the members of the corporation for acts for which judgment could be rendered against the property of the corporation by writ of *fi. fa.* or *distringas*. *Monnier vs. Godbold*, 116 La. 177 (40 Sou. 604).

Art. 444.

Nothing less than mere proof of fraud and injury, or the violation of some prohibitory law of the State, would justify the Court in annulling the sale where a two-thirds' majority of the stock acted in favor of this sale at a stockholders' meeting. *Slattery vs. Greater New Orleans Realty & Development Co.*, 128 La. 876 (55 Sou. 560).

Art. 446.

A minority of the congregation, under the case as presented, had no right to break up the church by forcing the sale of its property for the purpose of partition on the plea of being owners in indivision. *LeBlanc et al. vs. Leamire et al.*, 105 La. 539 (30 Sou. 135).

Though owned by a limited company, and having for its primary and principal function the carrying of logs to a sawmill, a railroad which runs regular trains for freight and passengers, with a fixed schedule of charges, is entitled to the exemption accorded by Art. 230 of the Constitution to any railroad or part of such railroad constructed within certain specified dates. (This case decided with reference to Art. 446.) *Amos Kent Lbr. & Brick Co. vs. Tax Assessor*, 114 La. 862 (38 Sou. 587).

Art. 447. See Art. 14, 107 La. 28.**Art. 448.**

Such rights as railroads must acquire for entering a city are real rights. "Real rights" are real estate in the

legal sense of the word. *City of Shreveport vs. Kansas City, S. P. & G. Ry. Co.*, 125 La. 583 (51 Sou. 648).

Refer to Art. 462.

Art. 451. See *Minor's Heirs vs. City of New Orleans*, 115 La. 311.

Art. 453.

A general law in terms directing that all property be taxed, including bonds and credits, does not include public property as property to be taxed, nor "public securities" due by the municipality by which they are issued; nor does it include within its terms public credits of the municipality by which the tax is demanded. *State vs. Board of Assessors*, 111 La. 982 (36 Sou. 91).

The State, being charged with the administration of the banks of the Mississippi River within the limits of the City of New Orleans, and the public wharves and landings thereon, must necessarily discharge its functions by means of an agent, and until 1896 acted through the City of New Orleans. It then appointed as agent for the purpose of such administration the Board of Commissioners of the Port of New Orleans, and in so doing withdrew from the city all authority that had been granted to it in that behalf, "save," as this Court has decided, "in connection with private wharves," and conferred that authority on the agent so appointed. The city has, therefore, no present jurisdiction over the wharves and landings mentioned as such, and, hence, has no power, without the consent of the Board of Commissioners, to authorize the construction and maintenance of a railroad thereon. *Board of Commissioners vs. New Orleans & S. F. R. Co.*, 112 La. 1012 (36 Sou. 837).

In speaking of a river as a boundary, the stream in its ordinary state of high water is intended. Otherwise, the bed might belong to the public, or the riparian owner, according to the rise or fall of the river. *Minor's Heirs vs. City of New Orleans*, 115 La. 311 (38 Sou. 999).

Moreover, the grant upon its face purports to be made for the personal benefit of the grantee, and the Police Jury was without authority to turn over a street or highway to an individual. *Kuhl vs. St. Bernard Rendering & Fertilizing Co.*, 117 La. 90 (41 Sou. 361).

As plaintiff's right of passage in the streets is subject to the rights of the public or of other railroads duly authorized by the municipality to use the same streets in the exercise of the public right of transit, there is no basis in reason or equity for plaintiff's demand on defendant for the cost of the entire appliance required by law for the protection of the public and both railroads against accidents at their common crossing. *L. & N. R. Co. vs. N. O. Terminal Co.*, 120 La. 978 (45 Sou. 962).

A petition which alleges ownership and possession of certain tracts of land, said to form part of the peninsula of the Parish of St. Bernard, which projects into the waters of the Gulf of Mexico, and to which are annexed, as muniments of the title set up, patents from the State, showing that such tracts were acquired as containing a certain number of acres subject to tidal overflow, and at a fixed price per acre, discloses no cause of action, in so far as it alleges trespass upon the portions of the sections mentioned in the patents which lie beneath the waters of the gulf, since they cannot have title to any land beyond the high-water mark. *Louisiana Navigation Co., Ltd., vs. Oyster Commission of Louisiana*, 125 La. 740 (51 Sou. 706).

Refer to Arts. 454, 455, 457, 458, 459, 470, 2450.

Art. 454. See Art. 453, 120 La. 978.

Art. 455. See Art. 453, 112 La. 1014, 115 La. 315.

Where the city, holding for public use batture property, upon the Mississippi River, which has in front a shoaling bank, determines, for the convenience of commerce, to advance the landing line to reach deep water, it has the legal right to enter into an agreement with private individuals to do the work necessary for this purpose, and to receive as an equivalent for such work a right of reasonable temporary use of such extension and the batture just behind. The naked owner of the batture cannot disregard the agreement and dispossess the parties holding possession under it, on the ground that such occupancy of the ground is a private occupancy. *Asylum vs. City of New Orleans*, 104 La. 392 (29 Sou. 117).

Art. 457. See Art. 453, 115 La. 311.

Art. 458. See Art. 453, 117 La. 90, and 120 La. 983.

Art. 459. See Art. 453, 111 La. 998.

Art. 460.

The purchaser of property sold at Sheriff's sale in foreclosure of a mortgage does not acquire under his purchase the chandeliers and brackets placed in the dwelling-house thereon by the owner. They are movables not immobilized by destination. *L'Hote & Co. vs. Fulham*, 51 La. An. 780 (25 Sou. 655).

Shares of stock are incorporeal things, and cannot be donated *inter vivos* except by act before a notary and two witnesses. *Succession of Sinnott vs. Bank et al.*, 105 La. 711 (80 Sou. 233).

Refer to Arts. 468, 469, 480, 1536, 2489, 2490.

Art. 462. See Arts. 448, 125 La. 583.

Art. 465.

But the immovability provided for is only one *in abstracto*, and without reference to rights on or to the crop acquired by others than the owners of the property to which the crop is attached. The existence of a right on a growing crop is a mobilization by anticipation, a gathering, as it were, in advance, rendering the crop movable *quoad* the right acquired therein. *Lumber Co. vs. Sheriff & Tax Collector*, 106 La. 418 (30 Sou. 902).

Under Act No. 188 of 1904, p. 420, taken in connection with the pre-existing law, the sale of standing timber, though made with a view to its separation from the land, is a sale of an immovable, and as such is open to attack for lesion beyond moiety. *Smith vs. Huie-Hodge Lumber Co.*, 123 La. 960 (49 Sou. 655).

They must be understood to have undertaken to acquire and transfer the land free of incumbrances, and not despoiled of any of those appurtenances which, in law and according to the ordinary understanding of men, form part of it, chief among which is the timber standing upon it. *State vs. Hamilton*, 124 La. 132 ((49 Sou. 1004)).

Standing timber is property susceptible of being acquired separately from the land on which it grows; and, being thus acquired, it is assessable for taxation in the name of the owner, while the land itself is assessable to the owner of the fee. That is to say, the owner of the land must pay

the taxes on it, the owner of the timber taxes on it; and the assessments should be separate. *Lumber Co. vs. Sheriff & Tax Collector*, 106 La. 414 (30 Sou. 902).

Refer to Arts. 468, 1862, 2589, 2594.

Art. 468. See Art. 460, 51 La. An. 783; also, *State vs. Sugar Refining Co.*, 108 La. 645; *Villere vs. New Orleans Pure Milk Co.*, 122 La. 735; *Bank of Lecompte vs. Lecompte Cotton Oil Co.*, 123 La. 844; **Art. 465, 123 La. 962 (49 Sou. 655).**

It may, and undoubtedly is, the case that sugar cane severed from the ground and placed in the windrow on the plantation for the service of the place (to be used later as seed cane) remains "immovable by destination." *State vs. Green et al.*, 106 La. 441 (30 Sou. 998).

Where a sugar-house was destroyed by fire, and the machinery therein was left in a demolished condition, valuable only as metal, the remains of such machinery are not subject to a legal mortgage held by plaintiff at the date of the fire. *Folse vs. Triche*, 113 La. 915 (37 Sou. 875).

The mules for the price of which the notes in question were given, as also the other mules on the plantation, were placed thereby the owners for the service of the plantation, became immovable by destination, and were affected by, and sold under, the mortgage held by Baldwin; and the same thing may be said of the corn and hay. *Borah & Landin vs. O'Niell*, 121 La. 756 (46 Sou. 788).

Refer to Art. 3289.

Art. 469. See Art. 460, 51 La. An. 783; *Bank of Lecompte vs. Lecompte Cotton Oil Co.*, 125 La. 844.

Art. 470. See *Suc. of Sinnott vs. Bank et al.*, 105 La. 714; see Art. 453, 111 La. 998.

The right or franchise to lay the roadbed and tracks in the streets may be an incorporeal thing, according to the definitions of the Civil Code, Art. 470; but the incorporeal right becomes merged into the corporeal when the cross-ties, steel rails and bolts and fastenings are put down in the cement, mortar and concrete of the paved street. They are then the incorporeal right and the corporeal thing. *City*

of Shreveport vs. K. C. S. & G. Ry. Co., 125 La. 583 (51 Sou. 648).

Refer to Art. 471.

Art. 471. See Art. 470, 125 La. 583.

We have seen that the land has not been expropriated; that the owner has not waived his title; but that these parties entered into an agreement, the effect of which we would not be justified in changing. The land was not acquired by any of the modes required. It is true that it is occupied by the defendant, and that occupation is one of the modes of acquiring. But defendant does not come within the requirements in order to acquire by occupation. He holds under a license which precludes the acquisition or right claimed by him. *McCormick vs. Louisiana & N. W. R. Co.*, 109 La. 767 (33 Sou. 762).

Refer to Arts. 729, 734, 2440.

Art. 474.

It is true that shares of stock in corporations are movables. Article 474 of the Code expressly declares them to be movables; but they are not corporeal movables. Stockholders in a bank are not the owners of any portion of the bank's property, though they are interested in its affairs, and, indirectly and consequently, in its property. *Succession of Sinnott vs. Bank*, 105 La. 716 (30 Sou. 233).

Refer to Art. 483.

Art. 475. See State vs. Board of Assessors, 111 La. 998.

Art. 476. See C. C., Art. 3298.

It matters not whether the building be demolished by the act of the owner or by natural causes. The French Courts hold that, where a house has been burned, a mortgage thereon cannot be enforced against the materials which escape the flames. This results from the doctrine of the civil law that mortgages can exist only on immovables. *Folse vs. Triche*, 113 La. 917 (37 S. 875).

Art. 478. See Suc. of Sinnott vs. Bank, 105 La. 711.

Art. 480. See Art. 460, 51 La. An. 783.

Art. 483. See Art. 475, 111 La. 998.

Art. 485.

The State becomes the owner at the time of the death of the owner. The proceeds of such property form part of the free school fund of the State under the Constitution, Art. 298. *Cordill vs. Quaker Realty Co.*, 130 La. —— (58 Sou. 819).

Refer to Art. 929.

Art. 488.

It has become elementary with us that the testamentary power must be exerted in subordination to the titles of ownership prescribed by our Code. Our law will not tolerate the introduction of tenures not recognized by the Code, and in the Code full ownership with its modifications receives explicit determination. *Succession of Kernan*, 52 La. An. 50 (26 Sou. 749).

The city does not hold this property by any such tenure. It does not, and will not, belong to the city, to the exclusion of the plaintiff, until the twenty-five years shall have expired. The title conveyed to the city is to be viewed and construed in the light of the city ordinance authorizing the sale of the franchise and stipulating the consideration the city was to receive therefor. *Maestri vs. Board of Assessors*, 110 La. 524 (34 Sou. 658).

A condition of alienability attached to a donation for pious uses is void, and reputed not written, both as creating a tenure of property not provided for by our Code, and, therefore, impliedly forbidden, and as putting property out of commerce, and, therefore, contrary to public policy. *Female Orphan Society vs. Y. M. C. A.*, 119 La. 278 (44 Sou. 15).

Refer to Arts. 489, 490, 533, 534, 535, 606, 612, 1519, 1895.

Art. 489. See Art. 488, 110 La. 525, and 119 La. 280.**Art. 490. See Art. 488, 110 La. 525, and 119 La. 280.**

The plaintiff had no vested right to occupy any particular position in the streets. Such right as it had was *ab initio*; not an absolute, but an imperfect, right, contingent and conditional in its nature, controlled by law and the regulation of the police authorities. *N. O. Gas Light Co. vs. Drainage Commission*, 111 La. 838 (35 Sou. 729).

An act of sale in the ordinary form, save that it contains a stipulation whereby the vendee binds himself, his heirs and assigns, to transfer the land to the vendor, his heirs and assigns, when the timber shall have been removed, or at the expiration of fifty years, even though the timber be not removed, vests an imperfect ownership and real right, and affords sufficient basis for a petitory action. *Ruddock Cypress Co. vs. Peyret*, 111 La. 1019 (36 Sou. 105).

True, the State is made part owner of the building; for to have the perpetual free use of the thing is to be *pro tanto* its owner. (Arts. 490, 492, 494, 626, 633, 637, 638.) *Benedict vs. City of New Orleans*, 115 La. 656 (39 Sou. 792).

The acquisition of the land by the homesteader under the Federal homestead laws dates from the entry. The occupying and cultivating of the land for five years and the making of the final proofs are merely conditions imposed upon the title; and the accomplishment of these conditions has a retroactive effect to the date of the entry. *Crochet et al. vs. McCamant et al.*, 116 La. 1 (40 Sou. 474).

Where the owner of a claim for money assigns the same to another, the assignment, as a matter of form, is complete, and the assignee becomes the owner of the claim. *Sintes vs. Commerford*, 112 La. 706 (36 Sou. 656).

Refer to Arts. 492, 494, 633, 637, 638, 703, 1997, 2012, 2021, 2025, 2041.

Art. 491. See Succession of Herber, 128 La. 118; State vs. Board of Assessors, 111 La. 998.

While, under some circumstances, one corporation may not lawfully acquire holdings of stock in another corporation, such holdings do not partake of the fullness of perfect ownership. They rather come under the head of what Art. 422 of the Code describes as imperfect ownership. *State ex rel. Jackson et al. vs. Newman et al.*, 51 La. An. 834 (25 Sou. 408).

The interest of each heir in the immovable property inherited under the circumstances shown in this case is one of joint ownership, but joint ownership under the special tenure of heirship. It is not an absolute, but an imperfect ownership, as was held in *Bank vs. David*, 49 La. An. 136. *Bryan vs. Bonvillian*, 111 La. 458 (35 Sou. 632).

Article 491 declares that perfect ownership of the property gives the right to the owner to enjoy and dispose of it

in the most unlimited manner; but this broad statement is modified by Art. 492 adding "when this can be done without injuring the rights of others; that is, those having other rights to exercise upon the same property." Defendant is not the proper party to decide whether the alterations made by himself were beneficial to the plaintiff or were deemed by her desirable. It is for the plaintiff herself to deal with that question. Even advantageous changes cannot be forced upon her without her consent. *Wood vs. Monteleone*, 118 La. 1011 (43 Sou. 657).

Refer to Arts. 492, 2692.

Art. 492. See Art. 491, 51 La. An. 838, 111 La. 458; Art. 490, 116 La. 8; Art. 492, 118 La. 1011; Art. 490, 115 La. 656.

Imperfect ownership gives the right of enjoyment, and even of disposal, when it can be done without injury to the rights of others; that is, "those who may have real or other others can be safeguarded by enforcing laws relating to rights to exercise upon the same property." This right of usufruct. *Succession of Weller*, 107 La. 470 (31 Sou. 883).

Art. 493. See State vs. Board of Assessors, 111 La. 998.

Art. 494. See Art. 490, 115 La. 656.

Art. 495. See Art. 343.

Article 495 does not apply to the case of *Lyons vs. Woman's League of New Orleans*, 124 La. 222, as stated under Art. 343.

Refer to Art. 2443.

Art. 496. See State vs. Board of Assessors, 111 La. 998.

An absolute loss of ownership is a much more serious loss than the loss of a right to resist the enforcement of a tax upon that property; and yet, by statute law, the owner exposes himself to the loss of his right of ownership in a thing if he permits it to remain in the possession of a third person for a time sufficient to enable the latter to acquire it by prescription. *Gray vs. Tax Collector*, 107 La. 680 (32 Sou. 42).

We recognize the right of the Legislature, from motives of public policy, to force the parties to promptness in the

enforcement of their legal rights, declaring that, "if they fail to comply with the provisions of the law, and lose their rights, it would be their own fault, and not that of the law." Of course, in the exercise of this power, owners should be accorded a reasonable delay in which to vindicate their rights. It is not pretended that three years was an unreasonably short period. This principle is embodied in Art. 496 of the Civil Code. *Roussett vs. City of New Orleans*, 115 La. 557 (39 Sou. 596).

Refer to Arts. 626, 2915.

Art. 497.

Though an ordinance prohibiting the storage of explosive oils in large quantities within the corporate limits happens to have the effect of putting an end to a business, and of rendering valueless certain structures used in connection with the business, its enforcement will not constitute a depriving of property without due process of law when the circumstances justify its adoption as a police regulation. *City of Crowley vs. Ellsworth*, 114 La. 308 (38 Sou. 199).

Art. 501.

If the lessee is in possession under his lease, and the lessor ousts him, and makes the crop himself, the crop will clearly belong to the lessee. The crops belong to the owner of the soil, subject to the obligation on his part of reimbursing the expense of making it. In such a case the lessee is in possession *pro haec vice* as owner, and the lessor and owner is a trespasser. *State vs. De Baillon*, 113 La. 578 (37 Sou. 481).

Plaintiff had a title of record to one-fifth interest in the lands, and was not bound to take legal steps to stop operations thereon. Defendants had notice of such title, and proceeded at their peril. *Martel vs. Jennings-Heywood Oil Syndicate*, 114 La. 359 (38 Sou. 253).

Where the purchaser of standing timber constructed a canal for the removal of the timber, as authorized by the contract, and then used the canal for the transportation of timber from other lands, while the contract restricted the use of the canal to the removal of timber on the vendor's lands, the vendor, under Art. 501 of the Civil Code, pro-

viding that fruits produced by the thing belonged to its owner, though they may have been procured by the labor of another, could not recover from the purchaser the amount saved by the purchaser in using the canal for such other timber without reimbursing the purchaser the amount expended in constructing the canal, since the revenues were not produced by the use of the land of the vendor in its original condition. *Lestramps vs. La. Cypress Co., Ltd.*, 130 La. —— (58 Sou. 817).

Refer to Arts. 2015, 2742.

Art. 502.

They cannot be regarded in any other light than as intruders on the land. Being such, they can neither claim to be paid the expenses they incurred in deadening the trees nor the trees which they felled, nor their value. The expenses which they incurred were not such as were necessary for the preservation of the thing, and it may well be that the true owner may have preferred that the primitive forests should remain. *Beaux Rendoudet Lbr. Co. vs. Shadel*, 52 La. An. 2098 (28 Sou. 292).

The possessor in bad faith is entitled to recover from the owner of the soil only for those improvements of which the owner may order the removal. He cannot recover for ditching, clearing land, and other improvements inseparable from the soil. It makes no difference how much the value of the land has been enhanced thereby. In such a case the principle by which one man is not permitted to enrich himself at the expense of another has no application. *Doyers vs. Atkins Bros.*, 113 La. 303 (36 Sou. 974).

Refer to Arts. 503, 508, 3451, 3452.

Art. 503. See Art. 502, 52 La. An. 2098.

One to whom the defects of title are known is not a *bona fide* purchaser. *Schwenk vs. Schwenk*, 52 La. An. 243 (26 Sou. 857).

The defendant, as a possessor in good faith, is liable only for rents and revenues from judicial demand. *Foreman et al. vs. Hinchcliffe et al.*, 106 La. 234 (30 Sou. 762).

A private sale of minors' property by their tutor to pay the debts is void; and it is none the less so because a family meeting advised it and the Judge homologated the proceedings of the meeting. The immediate vendee in such

a sale may be a possessor in bad faith; but it does not necessarily follow that his vendee, or the vendee of his vendee, is not likewise in bad faith. A purchaser may well be in good faith, though his vendor was in bad faith. *Blair vs. Dwyer*, 110 La. 332 (34 Sou. 464).

A possessor in good faith is liable for rents and revenues from judicial demand only. *Pecot vs. Prevost*, 117 La. 765 (42 Sou. 259).

The act evidencing a remunerative donation need not recite the value of the thing given or of the services intended to be compensated; and remunerative donations, not being real donations, and not being subject to the rules applicable to donations *inter vivos*, need not be recorded in a separate book, but should be recorded, if conveying real estate, in a conveyance book of the parish in which the property conveyed is situated; and a purchaser under such conditions is in good faith. *Bowlus vs. Whatley*, 129 La. 509 (56 Sou. 423).

Refer to Arts. 1525, 1526, 1554, 2252, 3451.

Art. 505.

The prohibition of building on an estate, or building above a particular height, is a continuous, non-apparent servitude, which can be established only by title, and is not included in any servitude of light and view, which can be acquired by prescription. *Goodwin et al. vs. Alexander*, 105 La. 658 (30 Sou. 102).

If, after submergence, the water disappears from the land, either by gradual retirement or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation, extent, quantity or boundary lines, the proprietorship returns to the original owner. *Hughes et al. vs. Heirs of Birney et al.*, 107 La. 664 (32 Sou. 30).

Even assuming that the relation between the two lots had been established by the vendors, the destination made by the owner is equivalent to the title with respect only to continuous, apparent servitudes; whilst the prohibition of building on an estate is a non-apparent servitude; and, whether continuous or discontinuous, can be acquired only by title. *Rivet vs. Howard*, 109 La. 113 (33 Sou. 103).

But they would not, in that case, have included the right of prohibition of building on the adjoining lot or of

building above a particular height, which is a continuous, apparent servitude, and cannot be established either by the destination *du pere de famille* or by immemorial possession, but only by title. *Bernos vs. Canepa*, 114 La. 520 (38 Sou. 438).

Refer to Arts. 509, 727, 728, 766, 767, 770.

Art. 507.

The privilege of the vendor of a movable ceases to exist when the movable ceases to be a movable by becoming incorporated into immovable property. Where, in pursuance of the contract to repair a sugar-house, a foundry takes out old pieces and puts in new pieces of machinery, casting or making the pieces especially for the purpose, the new pieces so added become merged into the sugar-house, and lose their character of movables. The rule is different where the machinery sold is complete within itself. *Swoop vs. St. Martin*, 110 La. 237 (34 Sou. 426).

Refer to Arts. 508, 3348.

Art. 508. See Art. 502, 52 La. An. 2098, and 113 La. 339; also, see Lomax vs. Phillips, 113 La. 858; Wells vs. Blackman, 121 La. 424; see Art. 507, 110 La. 238.

Having gone upon the land under the circumstances shown, and believing himself its owner, opponent cleared part of it and erected improvements. Unquestionably he is entitled to compensation therefor. *Succession of White*, 51 La. An. 1707 (26 Sou. 428).

The plaintiff having been adjudged a possessor in bad faith, it is optional with defendant to keep or not the buildings and fences. *McDade vs. Bossier Levee Board*, 109 La. 637 (33 Sou. 628).

The house and fence were put on the land by the defendant in avowed hostility to plaintiff's rights, and, therefore, in bad faith. The option lies with plaintiff, therefore, to require their removal at defendant's expense or to keep them upon paying their cost. *Jones vs. Goss*, 115 La. 929 (40 Sou. 358).

The evicted possessor in good faith is entitled to the value of his useful improvements—*i. e.*, cost of material and workmanship—unless the plaintiff elect to pay, and show

by evidence, the enhanced value of the soil. (*Hutchinson vs. Jamison*, 38 La. An. 105.) *Foster vs. Myers*, 117 La. 217 (41 Sou. 551).

While she was entitled to the land, she was not entitled to the improvements; for, even if Kidd had been in bad faith, he had a right to the improvements on the property; and, the plaintiff having levied an attachment on the land and improvements, to the extent that the land was in the name of Kidd she should be permitted to recover. *Page vs. Kidd*, 121 La. 8 (46 Sou. 35).

Compensation for improvements cannot be claimed by a possessor in bad faith until the owner elects to retain them; and the possessor owes no rents for his improvements until they are paid for. *Quaker Realty Co. vs. Bradbury*, 123 La. 24 (48 Sou. 570).

Art. 509. See Art. 505, 107 La. 668; also, see *Whan vs. Hiller*, 110 La. 570.

Temporary uncovering of parts of the bed of the lake by the recurring annual ebb of the waters, to become covered again by their rise or flow at the appropriate season, does not constitute dereliction. 51 La. An. 1718 (26 Sou. 378).

Refer to Art. 510.

Art. 510. See Art. 509, 51 La. An. 1724.

Art. 512.

Lands and islands belonging to, or situated within, the limits of a levee district are not within the purview of Section 1 of Act 124 of 1902, ordering the survey and sale of islands and lake lands for public school purposes. By Act 191 of 1908, the low lands in the Mississippi River within the limits of the Parishes of East Carroll, Madison, Tensas and Concordia were granted to the Board of Commissioners of the Fifth Louisiana Levee District. *State vs. Capdevielle*, 128 La. 283 (54 Sou. 820).

Art. 524.

Privileges for advances will not have the effect of a pledge on that part of the crop needed for seed. The holder of the privilege has no right to interfere with the seed put aside in good faith, and when there is not the least ground

upon which to base the allegations of fraud. *Dunlap vs. Berthelot*, 122 La. 535 (47 Sou. 882).

Art. 533. See Art. 488, 52 La. An. 50, and 119 La. 282.

Art. 534. See Succession of Cormier, 52 La. An. 882; see Art. 448, 119 La. 282.

The French law, so largely relied on by plaintiffs, differs textually from our own. The Code Napoleon contains no article expressly defining perfect and imperfect usufruct, as do Arts. 534, 535 and 536 of our Louisiana Code. The conclusions of the French commentators as to what constitutes perfect and imperfect usufruct are based upon the verbal construction of Arts. 582 and 587 of the Code Napoleon. *McQuire vs. Fluker*, 112 La. 92 (36 Sou. 231).

It is obvious that bank stock does not fall within the purview of Art. 534, but represents an investment of money for the purpose of producing revenue. In such a case the usufructuary is entitled only to the fruits, as in the case of "rents of real property, the interest of money, and annuities." *Lurey vs. Mayer*, 122 La. 488 (47 Sou. 839).

Promissory notes fall into the category of things which cannot be used without being expended or consumed, or without their substance being changed; and, hence, are subject to imperfect usufruct; and the usufructuary may dispose of them at his pleasure, under the obligation of accounting for their value at the expiration of the usufruct. *Miguez vs. Belcambre*, 125 La. 177 (51 Sou. 108).

Refer to Arts. 535, 536, 544, 545.

Art. 535. See Art. 534, 112 La. 83, 92; see *Endom vs. City of Monroe*, 112 La. 786; see Art. 488, 119 La. 282.

Art. 536. See Succession of Cormier, 52 La. An. 882; see Art. 534, 112 La. 83, 122 La. 488, 125 La. 194.

The usufruct being of money, the usufructuary owns the thing subject to the usufruct, and could bring an action therefor. The usufructuary can maintain all actions necessary to insure her possession and enjoyment of the right. *Kahn vs. Becnel & Co.*, 108 La. 300 (32 Sou. 444).

Art. 539. See *McQuire vs. Fluker*, 112 La. 96.

Art. 544. See **Art. 534**, 112 La. 488.

Art. 545. See **Art. 534**, 122 La. 488.

Art. 547.

The usufructuary is entitled to fruits and revenues from day to day. As much of the rental as has been earned at the date the succession was opened was due to the succession. *Gaspard vs. Coco*, 116 La. 1097 (41 Sou. 326).

The surviving husband, as usufructuary of the community property, does not become the owner of the deceased wife's half interest in bank shares acquired during the marriage, but is entitled to all the dividends accruing therefrom until the termination of the usufruct. *Lurey vs. Mayer*, 122 La. 488 (47 Sou. 839).

Interest earned by the deposit in the bank of all the moneys belonging to an insolvent corporation, like other fruits, civil and natural, become the property of the owner of the funds. A judgment ordering a receiver to pay certain creditors out of the funds under his control does not operate a change of ownership of such funds in favor of such creditors. *A fortiori* such a judgment does not vest in the creditors any proprietary rights in or to interest accruing on such funds before or after judgment. *Villere vs. N. O. Pure Milk Co.*, 125 La. 720 (51 Sou. 699).

Art. 549. See *Larry vs. Mayer*, 122 La. 489.

The French law brings under the head of imperfect usufruct only those things which must be consumed when they are used. The Louisiana law brings under that head not only things that are consumed, but also those that are expended, or where the substance is changed in use. There can be no doubt the Legislature intended to widen the class of things subject to imperfect usufruct by the terms "expended" and "substance changed." *McQuire vs. Fluker*, 112 La. 93 (36 Sou. 231).

Bank stock does not come under this article.

Art. 552. See *Guffey Petroleum Co. vs. Murrel*, 127 La. 489.

Art. 555.

The mother could sell her property rights in the boat. That she could, too, sell whatever usufructuary rights she had therein is equally certain. *Griffin vs. Burris*, 109 La. 220 (33 Sou. 203).

Art. 558.

The general rule is that all usufructuaries must give bond. The obligation of this bond is that the usufructuary will use, as a prudent administrator would do, the property subject to the usufruct, and that he will faithfully fulfill all the obligations imposed on him by law and by the title under which his usufruct is established. *McQuire vs. McQuire*, 115 La. 282 (34 Sou. 443).

The provisions of Art. 558, as to the furnishing of security by the usufructuary, do not refer to the usufruct of the surviving spouse under the usufruct laws of 1884. The usufructuary takes that usufruct without the obligation of giving security. The exemption from giving security extends over the entire share of the deceased, including moneys then on hand. *Succession of Dielmann*, 119 La. 102 (43 Sou. 972).

Art. 560.

A widow in community is not obliged to give bond as usufructuary of community property inherited by her children, unless so required by the last will of her husband. *Succession of Glancey*, 114 La. 1052 (38 Sou. 826).

Refer to Art. 916.

Art. 563.

The security to secure the return of the property may be required of the usufructuary, which, however, cannot be made to operate as a hindrance to the enjoyment of the property; for the usufructuary is entitled to the revenues resulting, after having complied with the articles of the Code on the subject, even though he may not have furnished security. The one treated as usufructuary cannot be required to pay the debts of the succession before going into possession and enjoying the usufruct. *Succession of Weller*, 107 La. 467 (31 Sou. 883).

When stocks or notes are converted into money through the maturing of the notes or the liquidation of

the corporations in which such stock is owned, the usufructuary holds these proceeds without giving security, just as if they had been money at the opening of the succession. The usufructuary cannot be compelled by the heirs to invest them in bonds and notes under Arts. 563 and 564. *Succession of Dielmann*, 119 La. 102 (43 Sou. 972).

Refer to Art. 564.

Art. 564. See Art. 563, 119 La. 102.

Art. 569. See *Voiers vs. Atkins Bros.*, 113 La. 336.

Art. 572.

After delivery of the building by the builder, and the acceptance by the contractor, and the expiration of twelve months stipulated in the contract, the contract could no longer, under the circumstances of the case, be violated actively; but, if there was a violation, it was passive, and the parties were entitled to notice. Instead, plaintiff chose to have the building repaired, and then made demand for cost of repair, regardless of the right which the builder had to repair the work, if repair was due by him. There is no question of fraud or deception on the part of the builder. *Police Jury vs. Johnson*, 111 La. 280 (35 Sou. 550).

Art. 584.

Article 605 of the Civil Code declares that the owner may mortgage, sell or alienate the thing subject to the usufruct without the consent of the usufructuary; but he is prohibited from doing it in such circumstances and under such conditions as may be injurious to the enjoyment of the usufructuary. This article deals with the conventional usufruct. We have several instances in the Code where the property affected by the usufruct is none the less authorized to be sold if sold subject to the usufruct. *Succession of Glancey*, 108 La. 421 (32 Sou. 356).

Refer to Arts. 585, 587, 605.

Art. 585. See Art. 584, 108 La. 421.

With reference to the debts which the usufructuary has been condemned to pay in the judgment before taking possession, this is a matter of advance; if not made by the usufructuary, the heir has the choice of making it or to sell part of the property. The usufructuary would have

all right on the remainder after a sale to pay debts; but he cannot, as a condition, be required to pay the debts. *Succession of Weller*, 107 La. 470 (31 Sou. 883).

Article 585 of the Civil Code, providing that, if a legacy of the usufruct includes all the property of the testator, and the universal usufructuary advances the sum necessary to discharge the debts of the succession, the capital shall be returned to him at the expiration of the usufruct without interest; but, if he does not make this advance, the heir has the choice of making the necessary advance himself, for which the usufructuary shall allow him interest for the period of the usufruct, or to sell a part of the property subject to the usufruct, applies to ordinary usufructs or to the usufruct of the survivor in community. *Long vs. Dickerson*, 127 La. 342 (53 Sou. 598).

Art. 587. See Art. 584, 108 La. 421.

Art. 605. See Art. 584, 108 La. 421; see *McQuire vs. Fluker*, 112 La. 97

Where one who owns an undivided half interest in real estate, which is not susceptible of division in kind, holds the other half interest as usufructuary, the owner of the naked title to the half so held cannot force the sale of either the naked or the perfect title in order to affect a partition. *Smith vs. Nelson*, 121 La. 171 (46 Sou. 200).

Art. 606. See Art. 488, 119 La. 285.

Art. 612. See Art. 488, 119 La. 285.

Art. 626. See Art. 496, 115 La. 626.

That part of the contract between plaintiff and defendant which stipulates for the former the privilege of remaining upon the property evidences nothing more than a right of use and habitation (C. C. 626, 627); and it is considered that the other clause, which asserts that the property, either in whole or in part, should not be sold by the vendee without the consent of the vendor, if it have any force at all, was intended only to protect plaintiff and her husband in her right of use and habitation. *Schenebert, Wife, etc., vs. Lemoine et al.*, 52 La. An. 592 (27 Sou. 56).

Refer to Art. 627.

Art. 627. See Art. 626, 52 La. An. 592.

Art. 633. See Art. 490, 115 La. 656.

Art. 637. See Barrow & LeBlanc vs. Penick & Ford, 110 La. 574; see Art. 490, 115 La. 626.

Art. 638. See Art. 490, 115 La. 626.

Art. 645. See Woodcock vs. Baldwin, 51 La. An. 1005.

Art. 658.

When Art. 2640 of the Civil Code declares that the proceedings set forth in the articles preceding it shall be required in all cases of expropriation, it means all cases of expropriation where the intention is to vest something more in the expropriating plaintiff than a mere right of occupation or use of the soil, as set forth in Art. 658. *Fuselier vs. Police Jury*, 109 La. 551 (33 Sou. 597).

The land expropriated by a railroad company for its right of way reverts back to the owner when it has ceased to be used for the purpose for which it was expropriated, as the ownership of the soil continues in the owner from whom the land was taken for the servitude. *L. & A. Ry. Co. vs. L. R. & N. Co.*, 127 La. 587 (53 Sou. 850).

Refer to Arts. 2631, 2635, 2639, 2640.

Art. 660.

The proprietor above can do nothing whereby the servitude of natural drain due by the estates below may be rendered more burdensome, as by diverting the waters of one drain into another by means of a levee. Where such diversion has continued for less than ten years, no prescription is applicable. *Savoie vs. Guillory*, 118 La. 455 (43 Sou. 49).

It follows from the plain text of the article that the proprietor of the estate above has no legal right to discharge into a natural drain the waste oil and salt water proceeding from wells sunk on his premises, and is responsible for the resulting damages to the estate below. *McFarlain vs. Jennings-Heywood Oil Syndicate*, 118 La. 537 (43 Sou. 155).

The provisions of this article cannot be successfully invoked by the owner of an upper estate to justify him in

throwing the slops from his sugar-house through a slop-ditch in large quantities upon the property below in manner such as to injure. The article refers to waters which flow naturally from the other estate, and not to the refuse which results from the manufacture of sugar in the sugar-house containing deleterious matter. *Barrow vs. Gaillardanne*, 122 La. 559 (47 Sou. 891).

When, therefore, defendant railroad company acquired its right of way, crossing all the natural drains in the western part of the Parish of Iberia leading to Vermilion Bay on the south, it did so *sub modo*; the condition being that it would not obstruct the natural drains. *Petit Anse Co-teau Drainage Dist. vs. Iberia & V. R. Co.*, 124 La. 502 (50 Sou. 512).

Refer to Arts. 661, 669, 795.

Art. 661. See Art. 660, 118 La. 455.

Art. 662.

When the owner of the land to whom a servitude is due finds the exercise of his rights prevented by the removal of the owner of the land owing the servitude of the gate giving entrance to the ground, and the latter refuses on demand to replace the matters as they stood, he is warranted in fearing, should he open the way to the grounds, that entrance thereto would be again barred by the owner unless he should be enjoined from so doing. *Patout vs. Lewis*, 51 La. An. 211 (25 Sou. 134).

Refer to Arts. 701, 702, 1930, 1954, 1964, 2490.

Art. 665. See Whan vs. Hiller, 110 La. 571.

While the owners of property upon the river front may be forced to yield a right of way for the public just back of the levee, they cannot be forced to do so upon the demand and for the benefit of a single individual where there is an existing way open for the public, though possibly not so convenient. *Sauter vs. Town of Vidalia*, 110 La. 377 (34 Sou. 558).

Refer to Arts. 667, 700, 862.

Art. 666.

There are certain obligations upon railroad corporations which exist independently of conventions or ordinance

or statute. There is a duty imposed upon everyone, whether natural persons or artificial persons, to avoid, by proper care, doing injury to others through their fault. *Lampkin vs. McCormick, Rec., etc.*, 105 La. 422 (29 Sou. 952).

The defendant company was not only charged by general law with the duty of seeing that its wires were so placed and so kept as to injure no one, but it was accorded by the town authorities the privilege or right of stringing its wires on its streets upon the express condition that it should use the utmost precautions in this respect. The company is charged with the legal duty of taking due care of it, having the burden of accounting for its having been found in bad condition, and to show that it was not due to its negligence. *Hebert vs. Lake Charles I., L. & W. W. Co.*, 111 La. 526 (35 Sou. 731).

Refer to Arts. 666, 667, 670, 2315.

Art. 667. See Art. 665, 110 La. 387; Art. 666, 111 La. 526; see Lewis vs. Sandell, 118 La. 854.

The owner of adjoining property is responsible in damages for every act of his which causes damage to his neighbor. (C. C., Arts. 667, 2315, 2316, 2317.) The contractor who executes the work for the owner is bound *in solido* with him when they are joint tortfeasors. *Egan vs. Hotel Grunewald Co.*, 129 La. 163 (55 Sou. 750).

Refer to Arts. 2316, 2317.

Art. 668.

A person who constructs a building upon his own property with windows in it upon the side facing his next neighbor's property, so that the privacy of the latter's residence is interfered with, cannot be made by his neighbor by injunction to close the windows. The latter's remedy is to establish screens upon his own property. *Bryant vs. Sholars*, 104 La. 786 (29 Sou. 350).

Where, in consequence of the moving back by the Board of Levee Commissioners of the levee upon the front of a town, its front street at certain points is occupied by the new levee to within a few feet of the front lines of the houses, leaving open in front of them only space for a sidewalk, a resident of the town living further down upon the front of the town cannot mandamus the town authorities to compel the moving back of the houses left standing in

order to have a continuous open street just back of the levee along the whole front of the town, nor can he compel this removal himself. The determination of that matter is left to the discretion of the town authorities, to be exercised so as to promote the general welfare and convenience. The private interests of a particular individual are forced to yield to those of the general public. (Arts. 668, 669.) *Sauter vs. Town of Vidalia*, 110 La. 377 (34 Sou. 558).

Refer to Arts. 669, 700.

Art. 669. See Art. 660, 118 La. 458; Art. 668, 110 La. 385.

As relates to the free circulation of air in houses where animals are kept, an appeal for the proper enforcement of the ordinances, regulations or customs on the subject is remedy enough. In enforcing such ordinances it would follow that the division walls of brick or lumber would prove sufficient protection. *Dubos vs. Dreyfous*, 52 La. An. 1121 (27 Sou. 663).

The odors complained of are the legitimate and natural cause of the nuisance charged. They are not shown to be injurious to health, but are a source of great discomfort to plaintiff and his family. A use of property which materially interferes with the physical comfort of those who live in the neighborhood, or which impairs the enjoyment of their homes, may be a nuisance, even though it does not impair their health or result in driving them from their homes. *Perrin vs. Crescent City Stock Yard and Slaughter House Co.*, 119 La. 83 (43 Sou. 938).

The location and operation of factories and other works likely to disturb the neighbors by smoke, smells, noise, etc., must be determined by the police regulations or customs of the place. Unavoidable noises resulting from the operation of an ice plant, constructed under a municipal permit, furnish no basis for enjoining its operation as creating a private nuisance. *LeBlanc vs. Orleans Ice Mfg. Co.*, 121 La. 249 (46 Sou. 226).

Art. 670. See Art. 666, 111 La. 526.

Art. 675.

Where, for instance, a wall rests equally on both premises to the extent of sixteen inches, instead of the minimum

of nine inches, and one of the proprietors desires to erect a stronger and thicker wall, he cannot take the additional inch from his neighbor's land. (Arts. 675, 682.) *Pokorny vs. Pratt*, 110 La. 610 (34 Sou. 106).

Refer to Art. 682.

Art. 677.

The presumption of Art. 677 that a division wall betwixt two buildings is a wall in common does not apply to a division wall between a building and a vacant lot. The division wall between a building and a vacant lot remains the exclusive property of the building until the owner of the adjoining lot pays its value or one-half the cost of construction. *Cordill vs. Israel*, 130 La. —— (57 Sou. 778).

Art. 682. See Art. 675, 110 La. 610.

Art. 684.

Article 684 of the Civil Code, which authorizes every proprietor adjoining a wall to make it a wall in common by reimbursing the owner of the wall one-half of the value and one-half the value of the soil upon which the wall is built, if the person who has built the wall has laid the foundation entirely upon his own estate, applies only to "walls" properly so called; it does not refer to inclosures in general. The article was, from public policy, in aid of general interest for the safety and solidity of brick or stone buildings, not in aid of the right of one neighbor to secure the privacy of his property by a restriction upon the rights of the ownership of his next neighbor. The side of a wooden building is not a wall. It may be made to give place to the right of the neighbor to have a wall built in lieu of it, but under proper circumstances and conditions. (Arts. 684, 696.) *Bryant vs. Sholars*, 104 La. 786 (29 Sou. 350).

Refer to Art. 696.

Art. 686.

The owner of an uninclosed lot cannot be made to contribute to the expense of a line fence. *Bouchereau vs. Guilne*, 116 La. 534 (40 Sou. 863).

Refer to Art. 687.

Art. 687. See Art. 686, 116 La. 534.

Art. 691.

A plaintiff, owner of the adjacent land, cannot maintain an action for damages for the trimming and cutting of a hedge planted on a highway by the municipal authorities. The hedge not having been planted on the boundary line of plaintiff's property, Art. 691 of Merrick's Revised Civil Code has no application, and his legal rights in the premises are confined to requiring the cutting of branches which may extend over his estate. *Bright vs. Bell et al.*, 117 La. 947 (42 Sou. 436).

Art. 696. See Art. 684, 14 La. 786.**Art. 697.**

Anyone violating this provision of the law could be forced to draw back the buildings or projections. If the exercise by the defendants of a legal right to construct a building on their own premises, with windows looking into or over the premises of the plaintiff, would subject the latter to annoyance from that fact, their remedy would be to remove the annoyance by screens on their own premises. *Bryant vs. Sholars*, 104 La. 794 (29 Sou. 350).

Art. 699. See State vs. Foster, 111 La. 243.**Art. 700. See Arts. 665 and 668, 110 La. 387; Art. 699, 111 La. 243.**

An injunction based on an implied right of passage is properly refused where it does not appear that the alleged place and mode of passage have been fixed by consent of parties or a judgment of the Court. An implied right of passage cannot exist where a special place and mode of passage have been fixed by contract. *Baldwin Lbr. Co. vs. Todd*, 124 La. 543 (50 Sou. 526).

Refer to Art. 703.

Art. 701. See Art. 662, 51 La. An. 220.**Art. 702. See Art. 662, 51 La. An. 220.**

Art. 703. See Art. 490, 111 La. 838; Art. 700, 124 La. 543.

Defendant constructed, in accordance with agreement, a depot building on plaintiff's land for the joint use of both. The volume of business having greatly increased, the depot is not adequate for the business. Plaintiff, because of the agreement, has the right to resume possession, and defendant ample time to remove its building. Defendant's right to bring suit for expropriating its land for a depot is reserved. *McCormick vs. Louisiana & N. W. Ry. Co.*, 109 La. 764 (33 Sou. 762).

Art. 709.

The owner of real estate has the right to establish on that portion which he retains, and in favor of that portion which he sells, such servitudes as he thinks proper, his power in that respect being limited only by consideration of public policy; and the use and extent of such servitude are regulated by the title by which they are established. *Bernos vs. Canepea*, 114 La. 517 (38 Sou. 438).

Refer to Arts. 716, 729, 743.

Art. 716. See Art. 709, 114 La. 517.**Art. 727. See Art. 505, 109 La. 116, and 114 La. 520.**

The destination *du pere de famille* is the use which the owner has intentionally established on a particular part of his property in favor of another part, and which is equal to a title with respect to the perpetual and apparent servitudes thereon; and by this destination *du pere de famille* is meant the disposition which the owner of two or more estates has made for their respective use. *Woodcock vs. Baldwin*, 51 La. An. 989 (26 Sou. 46).

In selling the soil, over which a roadway in use by the public passes, to another, a stipulation, couched in general terms, that the road is to be kept open and a bridge constructed across a small bayou for the use of the road is to be taken as a stipulation *pour autrui* for the public. And the public's assent to this stipulation in its favor is signified by its continuous use of the road and of the bridge

constructed over the bayou. *Lawson vs. Shreveport Water Works Co.*, 111 La. 73 (35 Sou. 390).

Under Arts. 727 and 766 of the Civil Code, defining "continuous servitudes" as those whose use is or may be continual without the act of man, and "discontinuous servitudes" as such as need the act of man to be exercised, and providing that the discontinuous servitudes can be established only by title, a railroad for the transportation of sugar cane is a discontinuous servitude, and not prescriptive. *Ogborn vs. Lower Terrebonne Refining & Mfg. Co.*, 129 La. 379 (56 Sou. 323).

Refer to Arts. 766, 1890.

Art. 728. See *Woodcock vs. Baldwin*, 51 La. An. 1002; **see Art. 505, 105 La. 658, 109 La. 116, 114 La. 520.**

Art. 729. See **Art. 471, 109 La. 768; Art. 709, 114 La. 517.**

Art. 734. See **Art. 471, 109 La. 768.**

Art. 743. See *Succession of Sinnott vs. Bank et al.*, 105 La. 714; **see Art. 709, 114 La. 517.**

Art. 763.

If the owner of two estates, between which there exists an apparent and continuous servitude, sell one of the estates without any mention being made of same in the title, it shall continue to exist in favor of or upon the estate which has been sold, destination *du pere de famille*, which, by Arts. 763, 764 and 765, was equivalent to a title creating a servitude as soon as a division of ownership of the properties took place by the sale from the City Bank to the parish. *Woodcock vs. Baldwin*, 51 La. An. 1006 (26 Sou. 46).

Refer to Arts. 764, 765, 767.

Art. 764. See **Art. 763, 51 La. An. 1006.**

Art. 765. See **Art. 763, 51 La. An. 1006; see 118 La. 458.**

This article, as amended by Act 25, 1904, p. 30, reads as follows: Continuous and apparent servitudes may be acquired by title, or by a possession of ten years. The

public, represented by the various parishes in this State, may also in like manner acquire a servitude by the open and public possession and use of a road for the space of ten years after the said road or servitude has been declared a public highway by the Police Jury; provided, that such servitude so acquired shall not extend beyond the width of forty feet.

Art. 766. See Art. 505, 109 La. 116, and 114 La. 520; also, see Art. 727, 129 La. 379; see Art. 505, 105 La. 660.

Applying this law, it has more than once been held by this Court that, in the absence of proof of intention on the part of the owner to dedicate his property to public use, the use of the passage by the public for however so long a time cannot supply a title or serve as a basis of prescription; but it impliedly invites the public to make use of it, and he is liable in damages for negligence. *Lawson vs. Shreveport W. W. Co.*, 111 La. 83 (35 Sou. 390).

Art. 767. See Art. 763, 51 La. An. 1002; see Art. 505, 109 La. 113.

Articles 767 and 771 are to be read in connection with other articles, and more particularly with Arts. 727 and 728, from which it appears that the prohibition of building is a continuous, non-apparent servitude, and Art. 766, which declares that continuous, non-apparent servitude can only be established by title. *Bernos vs. Canepa*, 114 La. 521 (38 Sou. 438).

Refer to Art. 771.

Art. 768. See *Woodcock vs. Baldwin*, 51 La. An. 1002.

Art. 769. See Art. 763, 51 La. An. 990, 1002.

The particular servitudes in question, being continuous and apparent (Arts. 727, 728), would have been established, under the circumstances (that is, servitudes of view and drip), by the mere sale of the property in its then condition, though they had not been especially mentioned. *Bernos vs. Canepa*, 114 La. 521 (38 Sou. 438).

Art. 770. See Art. 505, 114 La. 520.

Art. 771. See Art. 767, 114 La. 521.

Art. 772.

The owner of the land has the right when the servitude is not being exercised to strengthen for his own protection the gate giving access to the land subjected to the servitude, and the fence upon his boundary line; but he must do it in a manner not tending to diminish the use of the servitude or to make it more burdensome. *Patout vs. Lewis*, 51 La. An. 210 (25 Sou. 134).

Articles 772, 773, 774 and 775 apply only to conventional servitudes, according to *Petit Anse Coteau Drainage Dist. vs. Iberia & V. R. Co.*, 124 La. 509 (50 Sou. 212).

Refer to Arts. 773, 774, 775, 1894, 2442.

Art. 773. See *N. O. Gas Light Co. vs. Drainage Commission*, 111 La. 843; **see Art. 772, 124 La. 510.**

Art. 774. See **Art. 772, 51 La. 220, and 124 La. 510.**

Art. 775. See **Art. 772, 124 La. 510.**

Art. 777.

It may be conceded that the granting of the servitude to the plaintiffs did not withdraw from the defendant the right of repairing the gate and taking steps to protect his field or pasture from outside depredations by temporarily extending wires across the place occupied by the gate during the period when the servitude was not being exercised; but this is something other than a right to take down and remove the gate and to bar future entrance to the dumping-ground. *Patout vs. Lewis*, 51 La. An. 220 (25 Sou. 134).

All that the plaintiff asks is the right to have a crossing over defendant's right of way; a right of use at occasional periods; an easement which, in view of the fact that defendant is itself operating for public use and advantage, is subject to be altered to conform to future exigencies and contingencies. *Shreveport Traction Co. vs. K. C. S. & G. Ry. Co.*, 119 La. 775 (44 Sou. 457).

Refer to Art. 779.

Art. 779. See **Art. 777, 51 La. 220.**

The deed refers to the right of way as to be either on the line of the survey then made or on the line which might thereafter be located. There was no objection made to the

location of the road, either at the time or since. If, however, the place for the exercise of the servitude had not been fixed in the deed of the right of way, the owners were bound to have fixed the place where they wished it to be exercised. *Kirk et al. vs. K. C. S. & G. Ry.*, 51 La. An. 676 (25 Sou. 457).

Art. 783.

The mode of servitude is subject to prescription, as well as the servitude itself. A servitude acquired by using the land as a site for a depot can be preserved only by continuation of that particular use. The vestiges of buildings to which Art. 3502 has reference are only such as are of a character to challenge attention. Remnants of pillars flush with the ground and barely noticeable are not of that character. The free passage allowed over a plantation road for going to and from a railroad depot, no matter how long continued, cannot operate a dedication of the road. *Moore vs. Morgan's L. & T. R. & S. S. Co.*, 126 La. 843 (53 Sou. 22).

Refer to Arts. 789, 790, 791, 796, 8487.

Art. 789. See Art. 783, 126 La. 843.

Art. 790. See Art. 783, 126 La. 843.

Art. 791. See Art. 783, 126 La. 843.

Art. 795. See Art. 660, 118 La. 456.

Art. 796. See Art. 783, 126 La. 843.

Art. 800.

A railroad company taking possession without title of land needed for its operation must be held to have taken possession only of a servitude, except where the land is taken for a purpose for which the right of expropriation could not have been exercised, in which case the railroad takes as any ordinary person would. *Moore vs. Morgan's L. & T. R. & S. S. Co.*, 126 La. 843 (53 Sou. 22).

Art. 824.

The fixing of parish boundary lines is a legislative function; but where the Legislature has passed a statute for that purpose, and a dispute arises between two parishes as to which of two lines the statute has intended to adopt, the

matter involved is the interpretation of a statute—a clearly judicial function—and the Courts have jurisdiction of the controversy. *Parish of Caddo vs. Parish of De Soto*, 114 La. 366 (38 Sou. 273).

Art. 825.

An action of boundary pure and simple is not open to a plea of prescription. The action may be repelled by showing that the boundary line between the two properties has been settled by judicial decree or by a survey made by a surveyor in conformity with the requirements of the Civil Code. A line, however, when established between the parties by such a survey, yields to a demand for the rectification of the same under an allegation of error, unless the party resisting the rectification should allege and show an adverse possession of ten years under the erroneous line. *Williams vs. Bernstein*, 51 La. An. 115 (25 Sou. 411).

Where a part of the land sold is in the adverse possession of the defendant in a petitory action or action of boundary, the plaintiff cannot call in his own vendor for the purpose of condemning the latter to deliver possession of the land in controversy; but the right of action of the vendee against his vendor in such a case is limited to a claim for damages. *Clapham vs. Clayton*, 118 La. 419 (43 Sou. 36).

Refer to Arts. 829, 2485, 3478, 3498.

Art. 828.

Whether the suit be considered as an action in boundary or an action in damages for trespass, the Supreme Court is without jurisdiction *ratione materiae*. As relates to the boundary, the value of the land claimed by the plaintiff and that claimed by the defendant is not shown. *Beasley vs. Glassell*, 110 La. 230 (34 Sou. 424).

Art. 829. See Art. 825, 118 La. 422.

Art. 833.

The mere fact that parties owning adjoining properties have cultivated land up to a certain line, or up to a certain fence, built either by one or both, or built by one and repaired by the other, does not, *per se*, evidence an adverse possession or acquiescence in, knowledge of, or recognition of, an adverse ownership or an adverse possession. Until this formal survey happens, such land is held in "occu-

pancy," and not in "adverse possession"—certainly, in the absence of a clear and direct claim advanced of adverse ownership and possession. *Williams vs. Bernstein*, 51 La. An. 116 (25 Sou. 411).

Refer to Arts. 844, 853, 3478, 3498.

Art. 839.

The right of action, however, to rectify a mistake, after due notice has been given, of the survey, made according to the Code, is barred by the prescription of ten years. *Williams vs. Bernstein*, 51 La. An. 122 (25 Sou. 41).

Refer to Art. 3544.

Art. 840. See *Parish of Caddo vs. Parish of De Soto*, 114 La. 368.

Art. 844. See **Art. 833, 51 La. An. 123**; see *Hall vs. J. M. Burguiere Co.*, 125 La. 133.

Art. 845.

Where the description of a tract of land is ambiguous or uncertain, the particular construction put upon the deed by the parties may be resorted to for the purpose of ascertaining their intention. Possession governs where the metes and bounds cannot be fixed by reference to the respective titles. *Abadie vs. Lee Lbr. Co.*, 128 La. 1014 (55 Sou. 658).

Art. 847.

The Court survey indicates that the original section point can be located; and it follows that, if the case hinged exclusively on the title deed, the case would be with the plaintiff, as there would be no difficulty under the Code in fixing the lines. The plaintiff having the older title, calling for specific lands by government subdivision, the lines would have to be run accordingly. (Arts. 847, 849.) *Williams vs. Bernstein*, 51 La. An. 118 (25 Sou. 41).

Refer to Art. 849.

Art. 849. See *Williams vs. Bernstein*, 51 La. An. 118; see **Art. 847.**

Art. 852.

A claimant for land by adverse possession cannot tack to the time of his possession that of a previous holder where

the land is not included in the boundaries in the deed from such holder. *Ry Co. vs. Le Rosen*, 52 La. An. 192 (26 Sou. 854).

Where, in an action of boundary, it appears that plaintiff owns property to the eastward, and has no title to property lying to the westward, of a certain fence, and that defendant and his authors have held uninterrupted possession for more than sixty years of the property to the westward, and the defendant claims nothing to the eastward, of the fence, the boundary will be fixed at the line of the fence; and it is unnecessary to decide whether, under Art. 852 of the Civil Code, in order to prescribe beyond his title, defendant can add to his own possession that of his authors. *Opelousas National Bank vs. Perrodin*, 121 La. 581 (46 Sou. 658).

Refer to Arts. 3427, 3428, 3429, 3442, 3443, 3444, 3448, 3456, 3487, 3488, 3492, 3493, 3494.

Art. 853. See Art. 833, 51 La. An. 120.

Art. 854.

If one sells a tract of land from a fixed boundary to another fixed boundary, the purchaser takes all the land between such bounds, although it gives him a greater quantity of land than is called for in his title. In any controversy over surveys and boundary lines, courses and distances yield to natural and ascertained objects. *Leonard vs. Forbing*, 109 La. 221 (33 Sou. 203).

A sale of a tract of land four arpents front on a bayou by forty arpents in depth conveys one hundred and sixty arpents in a parallelogram, unless the contrary intention be clearly shown by the evidence. The rule is to measure the breadth along the stream by a line at right angles to one of the side lines, which are presumed to be parallel. Where the owner of a plantation sold portions thereof to different vendees, the first vendee will take the full quantity called for by his title, and the second will take what remains. *Minor vs. Daspit*, 128 La. 33 (54 Sou. 413).

Refer to Art. 2495.

Art. 856.

Defendant company was, by the Council of the city, granted the privilege of running its trains through a street.

It threw up an embankment, which obstructed the street and affected property values. The plaintiff, instead of opposing the constructions (Art. 856), acquiesced in the same and sought to recover damages from the company. No damages of any sort allowed. *Fontenot vs. Colo. Southern, N. O. & P. Ry. Co.*, 122 La. 779 (48 Sou. 205).

Refer to Arts. 857, 858, 859, 862, 863, 865, 867, 868.

Art. 857. See **Art. 856**; *Reynolds vs. Egan*, 123 La. 306.

Art. 859. See **Art. 856**.

Art. 861. See **Art. 856, 122 La. 786**.

Plaintiffs could have invoked Art. 861 to remove a poor, out-of-repair station. *Leveret vs. Shreveport Belt Ry. Co.*, 110 La. 403 (34 Sou. 579).

Art. 862. See **Art. 665, 110 La. 386**; see **Art. 856**.

Art. 863. See **Art. 856**; see *Asylum vs. City of N. O.*, 104 La. 400.

Act No. 70 of 1896, creating a Board of Commissioners for the Port of New Orleans, does not extend the powers of the board over the spaces occupied by the sheds erected thereon by the New Orleans Sugar Shed Company beyond those vested in the wharfingers prior to that act. This was invoked by Art. 863. *Fleitas vs. New Orleans*, 51 La. An. 1 (24 Sou. 623).

The Town of Morgan City has the right to enter upon riparian property within its limits for the purpose of building wharfs and in aid of commerce. *Young vs. Town of Morgan City*, 129 La. 344 (56 Sou. 303).

Art. 864. See **Art. 856**; *Reynolds vs. Egan*, 123 La. 306; see *Pokorny vs. Pratt*, 110 La. 609.

Art. 865. See **Art. 856**; *Reynolds vs. Egan*, 123 La. 306; see *Pokorny vs. Pratt*, 110 La. 609.

Art. 867. See **Art. 856**; *Reynolds vs. Egan*, 123 La. 306.

A livery stable is not a nuisance *per se*. In this case the relator seeks to have a mandamus issued to the trial Judge compelling him to grant a suspensive appeal from his order permitting the bonding. The application for a

mandamus is refused on the ground that the Judge's order would not work an irreparable injury under the circumstances. *Lewis vs. Sandell*, 118 La. 852 (43 Sou. 526).

Art. 868. See Art. 856, 122 La. 782.

Art. 871.

With regard to the case resting on facts, on one side, and denied on the other, to constitute a sale and delivery of movable property, made by a man who died the next day thereafter, a succession creditor, even the minor in necessitous circumstances, can claim no greater right than could a creditor of the deceased, who had attached the property after the alleged sale and before the man died. And the rule is that, whenever the owner has parted with his control over the property, and cannot change its destination, his creditors cannot attach. *Davenport, Tutrix, vs. Adler & Co. et al.*, 52 La. An. 264 (26 Sou. 836).

Where a succession owes debts, and the heirs do not come forward and offer to pay them, it is the duty of the administrator to recover the assets, and reduce them to cash for that purpose. *Succession of Delaneuville vs. Duhe*, 114 La. 62 (38 Sou. 20).

Refer to Arts. 872, 873, 940, 941, 1922, 2458, 2476, 2477.

Art. 872. See Art. 871, 114 La. 66.

It is contended that the sale to one of the defendants cannot be attacked until the will is annulled. We do not understand that the right of the legal heir to the property of the deceased is suspended by a void will of the deceased. The principle of the Code is that the legal heirs succeeds to the property of the deceased by the fact of his death. (C. C. 872, 873, 940, 941.) *Succession of McDermott*, 51 La. An. 175 (24 Sou. 787).

The assessment and judgment for taxes against a succession as such are legal when the heirs have not obtained a decree of Court recognizing and putting them in possession. *Succession of Levy*, 115 La. 383 (39 Sou. 37).

When the idea of planting a crop on a plantation under administration is conceived by the administrator long after the harvesting of the crop that was growing when the deceased died, and the crop is planted and harvested later,

still without authority from the Court, the creditors or the minor heirs (who could give no consent), neither such crop nor the obligations incurred in making it can be said to fall within the definition of the Code, Arts. 872 and 873. *Maxwell-Yerger Co. vs. Rogan*, 125 La. 1 (51 Sou. 48).

Refer to Art. 873.

Art. 873. See Art. 872, 51 La. 175, 115 La. 383, 125 La. 1; Art. 871, 114 La. 66.

Art. 875. See Succession of Jacobs, 104 La. 453.

Art. 876. See Succession of Jacobs, 104 La. 453.

Art. 877. See Succession of Jacobs, 104 La. 453.

Art. 879.

What are termed forced heirs are nothing more than certain legal heirs, who, by reason of their relationship to the deceased, have had reserved to them the right to claim as heirs, if they so elect, a certain portion of the property of the deceased, and which he may have disposed of to their prejudice. *Miller vs. Miller et al.*, 105 La. 262 (29 Sou. 802).

Art. 880. See Succession of Jacobs, 104 La. 453.

The quality of presumptive heir is given to him before the decease of the person from whom he is to inherit, as well as after the opening of the succession until he has accepted or rejected it. *Griffin vs. Burris*, 109 La. 218 (33 Sou. 201).

Art. 885. See Carrollton Land Imp. Co. vs. Eureka Home-
stead Society, 119 La. 701.

Art. 886. See Arts. 1709, 1886.

A clause in the will by which the testatrix, after making a number of legacies, declared, "After these bequests have been made, the remainder of my estate I desire my executors to use for any charitable institution they may think of benefiting to perpetuate my memory," does not fall under the provisions of Act 124 of 1882, and has, as to its validity, to be tested by the general rules of the Civil Code touching testamentary dispositions. So tested, it cannot

stand. *Succession of Honoria Burke*, 51 La. An. 538 (25 Sou. 387).

Refer to Arts. 1519, 1709.

Art. 888. See Succession of Jacobs, 104 La. 453.

Art. 894.

It is a general rule in matters of succession that the unconditional heir of a person is his representative, and stands in his place and his rights; that these rights are transmitted to the heir with all their defects as well as their advantages; that the extent of the rights of the deceased regulates those of the heirs, who succeed to all his rights which can be transmitted; that is, to all those which are not, like usufruct, attached to the person of the deceased. *Weil vs. Jacobs' Estate*, 111 La. 369 (35 Sou. 599).

Where all the parties to an act of partition but one have estopped themselves from contesting the legality and regularity of the proceedings, and warranted the title of the purchaser, and the one not so estopped dies, leaving as his heirs, through representation, the parties so already estopped, the latter cannot, through such acquisition of an additional interest in the property, attack the title of the purchaser or the regularity of the proceedings. *Chevalley vs. Pettit*, 115 La. 407 (39 Sou. 113).

Refer to Arts. 897, 943, 1289.

Art. 897. See Art. 894, 115 La. 407.

Under Art 897 of the Civil Code, representation takes place in favor of the children and descendants of the brothers and sisters of the deceased *ad infinitum*. In other words, the descendants, near or remote, of a predeceased brother or half-brother, or sister or half-sister, of the deceased, take the place of their ancestor *quoad* his or her distributive share in the succession. The Judge *a quo* correctly distributed the estate of the deceased as follows: Five-twelfths to a daughter of a brother of the deceased, five-twelfths to the grandchildren of a sister of the deceased, and the remainder, one-sixth, to the descendants of a half-brother of the deceased. *Succession of Jacobs*, 129 La. 432 (56 Sou. 538).

Art. 903. See *Lehman vs. Lehman*, 130 La. —; *see Art. 915.*

Where a person who dies leaving no children, but leaving a brother and sisters, has made donations *inter vivos* or *mortis causa* of his property exceeding two-thirds, the mother is a forced heir to the extent, not of one-fourth, but of one-third. (C. C. 1494; 35 An. 995.) *Succession of Ernest Jacobs*, 104 La. 447 (29 Sou. 241).

The anomalous result follows that the father or mother who concurs with the brothers and sisters receives one-fourth where the child dies intestate, and one-third where there is a will or donations. Hence, in the case at bar, the father has no interest in contesting the validity of donations the existence of which vests in him a larger proportion of his daughter's estate than he would have otherwise inherited. *Succession of Desina*, 123 La. 481 (49 Sou. 23).

Refer to Arts. 904, 911, 1493, 1494, 1495, 1496.

Art. 904. See **Art. 903, 123 La. 481.**

Art. 905. See *Lehman vs. Lehman*, 130 La. —; *see Art. 915.*

Art. 911. See **Art. 903, 104 La. 447; Art. 915, Lehman vs. Lehman, 130 La. —; see Scovell vs. Levy's Heirs, 118 La. 986.**

Art. 912. See **Art. 915, Lehman vs. Lehman, 130 La. —.**

Art. 913.

Between heirs acknowledged as required by Art. 209 of the Civil Code and collateral heirs not acknowledged at all, the Court holds that the former are entitled to inherit. *Bourriaque et al. vs. Charles*, 107 La. 217 (31 Sou. 757).

Refer to Art. 917.

Art. 915. See *Succession of Jacobs*, 104 La. 453.

The surviving spouse does not acquire, in usufruct, the estate of the deceased spouse by inheritance; and, hence, the right of usufruct is not subject to the tax imposed on in-

heritances. *Succession of Marsal*, 118 La. 212 (42 Sou. 778).

The usufruct in favor of a surviving spouse, which ceases when such spouse remarries, is that established by law upon so much of the share in the community property of the deceased spouse, who has died intestate, as may have been inherited by the issue of the marriage. The usufruct established by the will of the deceased in such share does not so cease. *Smith vs. Nelson*, 121 La. 170 (46 Sou. 200).

This article was amended by Act 57 of 1910, p. 93, as follows: In all cases, when either husband or wife shall die, leaving no ascendants or descendants, and without having disposed, by last will and testament, of his or her share in the community property, such share shall be inherited by the survivor in full ownership.

A surviving wife of an intestate, who has died without issue, but leaving a father and a brother, took nothing; the estate going to the surviving father and brother, as expressly provided by the Code. *Lehman vs. Lehman et al.*, 130 La. —— (58 Sou. 829).

Refer to Arts. 903, 905, 911, 912, 916, 917, 924, 2401.

Art 916. See Art. 560, 114 La. 106; Art. 915, 118 La. 214, and 121 La. 174; see Miguez vs. Delcambre, 125 La. 194.

A widow in community (not renouncing same) is, in the absence of action by creditors of the succession demanding formal administration of its affairs, entitled to be recognized as usufructuary of that portion of the estate devolving upon the legal heirs. But the mere written admission of this conclusion of law by those called by law to the succession does not suffice of itself to evidence an acceptance of the succession. *Griffin vs. Burris et al.*, 109 La. 216 (33 Sou. 201).

Laws conferring upon minors the right to dispose of their property *mortis causa*, even to the detriment of the usufruct on their property, do not confer a similar right upon heirs of age. The article of the Civil Code conferring the right upon minors to dispose of their property *mortis causa*, even to the detriment of the usufruct in favor of their mother and father does not have the effect of controlling or modifying Art. 916 favorable to the usufruct of

the father or mother on property earned by their joint industry. The usufructuary owns a personal and independent right, which in no way should shield her from all necessity of accepting or renouncing the community when called upon to elect. *Reems vs. Dielmann*, 111 La. 96 (35 Sou. 473).

The purchase by the widow of the shares of certain heirs of their father substituted for the widow's usufructuary rights in such shares a right of ownership therein; but such purchase cannot be invoked as a "renunciation" of her rights. By purchase she did not forfeit her usufructuary rights; nor can such purchase be held to be a "partial partition" between herself and the owners of the shares so purchased. *Succession of Dielmann*, 119 La. 102 (43 (Sou. 972).

Where a testatrix, at the disposing of all her property in a certain city in favor of her three unmarried daughters, declared as follows—to wit: "My interest of whatever character, and wherever situated outside of said city, I leave to be disposed of according to the laws where the same may be": *Held*, that such a declaration did not constitute a testamentary disposition in favor of the children of the testatrix of her community interest in the property situated in the State of Louisiana, to the prejudice of the legal usufruct of the surviving husband. *Succession of Maloney*, 127 La. 913 (54 Sou. 146).

Refer to Art. 1477.

Art. 917. See Art. 913, 107 La. 220; Art. 915, 118 La. 215, and Lehman vs. Lehman, 130 La. —.

Art. 918.

The term "stranger," within the meaning of a statute entitled "To levy taxes on all inheritances," etc., and actually imposing a tax on inheritances falling to ascendants, descendants, collateral relations and strangers, is intended to exhaust the whole category of persons who might be called to the inheritance, whether by will or *ab intestato*; and applies to all who have not in fact or by law the status of legitimate ascendants, descendants or collateral relations. *Succession of Baker*, 129 La. 76 (55 Sou. 714).

Refer to Arts. 919, 922, 923, 2841.

Art. 919. See Hodges' Heirs vs. Kell, 125 La. 97; **see Art. 918, 129 La. 90.**

An acknowledged or legitimated natural child is entitled, as niece of a natural aunt, to inherit the latter's estate, being a descendant of a natural brother, who previously died. *Succession of Fortier*, 51 La. An. 1563 (26 Sou. 554).

Refer to Art. 923.

Art 920.

So far as inheritance established by law is concerned, bastards are barred, the law allowing them nothing more than a mere alimony. And they have no greater capacity to take under disposition *mortis causa*. *Succession of Vance*, 110 La. 760 (34 Sou. 767).

Persons issue of an illegitimate union leave no succession unless they are acknowledged. The property goes to the State by operation of law. *Succession of Gravier*, 125 La. 733 (51 Sou. 704).

Art 922. See Art. 917, 129 La. 90.

The brothers and sisters of a child acknowledged by her mother succeed to her estate, if there is no legal impediment. *Succession of Gravier*, 125 La. 733 (51 Sou. 704).

Refer to Art. 923.

Art. 923. See Art. 919, 51 La. An. 1585; Art. 918, 129 La. 90; Art. 922, 125 La. 735.

It does not follow that the natural brothers and sisters inherit to the exclusion of natural children if they are acknowledged. *Bourriaque et al. vs. Charles*, 107 La. 220 (31 Sou. 757).

Art. 924. See Art. 915, Lehman vs. Lehman, 130 La. ____.

Art. 929. See Art. 485, 130 La. ____.

Art. 930.

And formal proceedings to the end of being recognized as heir and sent into possession must be taken in the manner pointed out by law. A mere *ex parte* order or recognition and putting into possession will be viewed as a nullity. And anyone having an interest, whether as heir or claim-

ant, owner of the property, or as creditor of the dead man, or of his succession, may appeal from such judgment. *Succession of Barber*, 52 La. An. 961 (27 Sou. 363).

The Civil Code requires that the surviving wife, claiming as heir, shall proceed to assert her rights contradictorily with a person appointed to defend the interest of the absent heirs. A decree of possession rendered without such appointment is null. Hence, the curator is a mere stakeholder, and cannot represent the absent heirs. *Succession of King*, 124 La. 819 (50 Sou. 735).

Where a husband, claiming as the heir of his wife, obtains a judgment recognizing him and putting him in possession as such of her estate, without the appointment of an attorney to represent the absent heirs of the wife, the judgment is of no more value than any other judgment rendered without citation; in other words, it is an absolute nullity; and the husband is no better off, by reason of it, with respect to the title of his deceased wife's interest in the community property, than if he had taken possession of such interest without any judgment. *McWilliams vs. Stair*, 128 La. 752 (55 Sou. 343).

Refer to Arts. 931, 932.

Art. 931. See all of Art. 930.

Art. 932. See Art. 930, 128 La. 752.

Art. 935.

Where A died at her domicile in the State of Mississippi, leaving real estate both in the Parish of Orleans and the Parish of Jefferson, and her more valuable property was situated in the Parish of Orleans: *Held*, that the Court for the Parish of Jefferson is without jurisdiction over the succession. The word "effects," as used in Art. 935, relating to the place of opening the succession, was a translation of the word "biens" used in the French text; both meaning property in its general sense. *Randolph vs. Kraft*, 128 La. 743 (55 Sou. 340).

Art. 936.

Where two persons are by law entitled to inherit from one another, the fact that they make wills in favor of each other does not deprive either of them of the benefit of the

presumption as to survivorship. *Succession of Langles*, 105 La. 40 (29 Sou. 739).

Refer to Arts. 937, 938, 939, 1710.

Art. 937. See Art. 936.

Art. 938. See Art. 936.

Art. 939. See Art. 936.

Art. 940. See Art. 871, 51 La. An. 175; Art. 943, 115 La. 1028.

The rule "*Le mort saisit le vif*," as established by C. C. 940, applies as well to the universal legatee as to the forced heirs; and, construing the article mentioned with Arts. 1504 and 3542, it follows that a testamentary donation, although exceeding the disposable portion, confers a title which is defeasible only at the suit of the forced heir, or his heirs or assigns, brought within five years. *Cox et al. vs. Von Ahlefeldt et al.*, 105 La. 544 (30 Sou. 175).

Our Code leaves no room whatever for doubt or surmise as to the fact if the property of a deceased person being transmitted directly and immediately to the legal heirs, or, in the absence of forced heirs, to the universal legatee, without any intermediate stage, when it would be vested in the succession representative, or in the legal abstract called "succession." *Tulane University vs. Board of Assessors*, 115 La. 1028 (40 Sou. 445).

Refer to Arts. 941, 942, 943, 944, 945, 946, 947, 1504, 1609, 1611, 1671, 3542.

Art. 941. See Art. 871, 51 La. An. 175, and 115 La. 1028, Art. 940.

The maxim "*Le mort saisit le vif*" does not apply to irregular heirs, such as the surviving spouse. *Succession of Barber*, 52 La. An. 960 (27 Sou. 363).

Art. 942. See Art. 940, 115 La. 1028.

Art. 943. See Art. 894, 111 La. 369; Art. 940, 115 La. 1028.

Art. 944. See Art. 940, 115 La. 1028.

Art. 945. See Art. 940, 115 La. 1028.

Art. 946. See Art. 940, 115 La. 1028.

The creditor's right in this respect is not defeated by an *ex parte* order of the Court, given within three months after the unconditional acceptance of the succession by the heirs, which, recognizing them as such, places them in possession thereof. The mere reference to themselves as children and heirs of a deceased person, made in a petition by his children asking for the probate of his will and the placing of his succession under administration of executors selected by him, is not an unconditional acceptance of his succession. *Succession of Hart*, 52 La. An. 364 (27 Sou. 69).

Refer to Arts. 897, 1011, 1012.

Art. 947. See Art. 940, 115 La. 1028.**Art. 949.**

The maxim "*Le mort saisit le vif*" does not apply to irregular heirs, such as the surviving spouse. The reason is that this sort of heir has only a right of action to cause himself or herself to be put in possession of the succession thus falling to him or her. *Succession of Barber*, 52 La. An. 963 (27 Sou. 363).

Art. 950. See Succession of Meunier, 52 La. An. 93.

The capacity of heirs to inherit must be determined by the laws in force at the date of the opening of the succession. *Succession of Davis*, 126 La. 179 (52 Sou. 266).

Art. 953. See Succession of Meunier, 52 La. An. 93.**Art. 960. See Art. 115, 106 La. 503, and 115 La. 779.****Art. 966.**

Where the donee murdered the donor, and then committed suicide, an action will not lie by the heirs of the donor against the heirs of the donee to revoke or dissolve the donation for cause of ingratitude. (C. C. 1561.) *Grandchamp et al. vs. Administrator of Succession of Billis et al.*, 124 La. 117 (49 Sou. 998).

Refer to Art. 1561.

Art. 973.

In the philosophy of the law, the revocation of donations for cause of ingratitude is considered as personal to

the donor; and the restricted provision in favor of the heirs of the donor is not only exceptional, but may be said to be inconsistent with the theory of the law. *Grandcrampt et al. vs. Adm. of Succession of Billis et al.*, 124 La. 126 (49 Sou. 1000).

Refer to Art. 974.

Art. 974. See Art. 973, 124 La. 126, and Succession of *Ledet*, 122 La. 204.

Art. 977. See Art. 1038, 111 La. 187.

Art. 982. See Art. 988, 109 La. 219.

Art. 984.

One cannot renounce the succession of an estate not yet developed, nor can any stipulation be made with regard to such a succession, even with the consent of him whose succession is in question. The acceptance or rejection made by an heir before the succession is opened is absolutely null, and can produce no effect. (C. C. 984, 1887.) *Succession of Jacobs*, 104 La. 447 (29 Sou. 241).

Refer to Art. 1887.

Art. 987. See Art. 946, 52 La. An. 364.

Art. 988.

The written declaration or admission of the mere capacity of heirship, made by the descendants of a man, does not of itself constitute an acceptance of his succession. Where there is no claim of anything by those styling themselves heirs, no affirmative action by them in assertion of the rights of heirship or ownership, no obliging themselves as heirs, or contracting as heirs, acceptance of the succession cannot be inferred against them. *Griffin vs. Burris*, 109 La. 216 (33 Sou. 201).

Refer to Arts. 982, 990, 999.

Art. 990. See Art. 988, 109 La. 216.

Art. 999. See Art. 988, 109 La. 216.

Art. 1000.

The provisions of this article do not cover this particular case, for he has not been sued for a debt of the de-

ceased; and, though he has been cited in the case, it has been through a curator *ad hoc*. The effect of the judgment rendered herein may not be to fix upon the absentee the status of an heir generally; but, if we give any effect at all to his being present in court through a curator *ad hoc*, as we think we are bound to do, the effect would be sufficient to pass this property on to the purchaser free from all claims of ownership on the defendant's part. *Wolverton et al vs. Stephenson et al.*, 52 La. An. 1155 (27 Sou. 674).

Art. 1011. See Art. 946, 52 La. An. 372.

Art. 1012. See Art. 946, 52 La. An. 372; Art. 1671, 115 La. 296; Succession of Filhiol, 119 La. 1002.

The administrator is the agent of all the parties concerned, who must pay the claims acknowledged, which he has been ordered to pay from the succession funds. Heirs can only obtain possession of the property inherited by paying the debts or by furnishing security to the creditors. *Succession of Willis*, 109 La. 281 (33 Sou. 314).

The lawmaker evidently contemplated that a partition of the succession pending the administration could be made; for the administrator is directed to hold and manage the property until the partition is to be made. Where, however, there are debts, we think the lawmaker contemplated that the succession should be entirely settled by the administrator, and the property only turned over afterwards to the heirs for the partition. *Kremer vs. Kremer*, 121 La. 500 (46 Sou. 600).

Executors cannot, by agreement among themselves, divest their seizin as executors and turn the property over to themselves as heirs; and, with or without such an agreement, the Court may not divest the seizin of the executors without a compliance on the part of the heirs with Arts. 1012 and 1671 of the Civil Code; and, with or without such an agreement, the right of the heirs to be put in possession on compliance therewith is absolute. *Succession of Burbant*, 126 La. 9 (52 Sou. 175).

Articles 1300 and 1301 do not enlarge the authority which the law confers upon an executor, or authorize him to withhold possession of the property from the heirs; and, when the heirs are put in possession, the executor becomes

functus officio. Succession of LeBlanc, 128 La. 1056 (55 Sou. 672).

They could also have required the universal legatee to give security. They could have also sequestered the property or enjoined the legatee from disposing of the same. *Bauman vs. Armbruster*, 129 La. 194 (55 Sou. 760).

Refer to Arts. 1047, 1300, 1301, 1671.

Art. 1014.

But the plaintiffs, who sued both for ownership and possession of the property, are entitled to exercise their right of action against the defendants as presumptive heirs and sole representatives of their mother. Under Art. 1014, they are called to the succession and seized thereof in right, and must be considered as long as they have not renounced the succession. The defendant appearing to be in possession of the disputed lands, the plaintiffs to the right of possession should have judgment against them. *Weil et al. vs. Richaub et al.*, 51 La. An. 1313 (26 Sou. 262).

Art. 1021.

It is true that, under the circumstances, creditors are authorized to avail themselves of, and exercise the rights of, their debtor; but where, for the exercise of the latter's rights, it is necessary that actions be brought by him against third persons on a right of action belonging to himself, the creditors' action should be carried on acting on the right of action belonging to him, and not directly on their own against him. (Arts. 1021, 1991.) *Jones Co. vs. Huffman*, 114 La. 1003 (38 Sou. 763).

A judgment creditor of a forced heir cannot (if at all) exercise his right to reduce or annul donations by the *de cujus* unless specially authorized to do so by a previous judgment of a Court, or unless such creditor has acquired in some legal manner the rights of the forced heir in the succession. *Ruddock-Orleans Cypress Co. vs. Deluppe*, 123 La. 831 (49 Sou. 588).

Refer to Arts. 1071, 1505, 1990, 1991.

Art. 1023. See Art. 301, 124 La. 105.

This Court has held that the heir who has permitted thirty years to elapse without having done any act showing an intention to accept a succession is barred by prescrip-

tion from any right as heir. (Arts. 1023, 3548.) *Terry vs. Heisen*, 115 La. 1083 (40 Sou. 461).

Refer to Art. 3547.

Art. 1024.

It is manifest that the heir cannot divide his acceptance and accept only a part; yet we think that he may renounce a part of the succession to one of his co-heirs, particularly as in this case, in order to equalize the share of each. He is bound as having accepted the whole succession; but it does not follow that, between him and his co-heir, he may not renounce; and this without making an act of donation. *Interdiction of Haaf*, 52 La. An. 251 (26 Sou. 834).

Art. 1029.

Article 1029 of the Civil Code, relative to the forfeiture of an heir's share in succession property embezzled or concealed by him, has no application to a legatee who was at the same time executrix of the estate. *Succession of Drysdale*, 130 La. —— (57 Sou. 789).

Art. 1031.

While the returning heir is entitled to recover his rights, he does so without prejudice to the rights which may have been acquired by a third person upon the property of the succession, or lawful acts done by those having control of it. *Martinez vs. Wall et al.*, 107 La. 742 (31 Sou. 1023).

Art. 1032.

A sale of succession property made to pay debts pursuant to order of the Court is not invalid merely because the order for the sale was obtained less than thirty days after the appointment of the administrator; and, where the records show that the property belonging to the succession was so in debt that a sale was necessary, the purchaser could rely on the decree of sale entered by a Court having jurisdiction. *Thibodeaux vs. Barrow*, 129 La. 397 (56 Sou. 339).

Refer to Arts. 1050, 1164.

Art. 1035.

Where, in a rule taken in the succession of the wife against the surviving husband, ordering him to show cause

why he should not disclose the property rights belonging to the succession, merely that the same may be noted in the inventory, the defendant, being called to the witness stand as a witness, refuses to answer questions propounded to him, though ordered to answer by the Court, he is properly adjudged guilty of contempt, and no appeal lies from the overruling of his acceptance; the judgment to that effect being interlocutory and working no irreparable injury. *Succession of Desina*, 118 La. 278 (42 Sou. 936).

Refer to Arts. 1036, 1039.

Art. 1036. See Art. 1035, 118 La. 278.

Art. 1038.

The major heirs, present or represented, have the unquestioned right to accept the succession with benefit of inventory. Such an acceptance necessarily involves an administration of a succession which owes debts. An administration is necessary when one of the major heirs demands it or there is a minor heir. *Succession of Bulliard*, 111 La. 187 (35 Sou. 508).

Refer to Art. 977.

Art. 1039. See Art. 1035, 118 La. 278.

Art. 1041.

Where some of the heirs are beneficiaries, and there are debts, and creditors or heirs of age demand an administration, it should be ordered. *Succession of Bulliard*, 111 La. 186 (35 Sou. 508).

Art. 1042.

The beneficiary of age, present or represented in the State, is preferred to the surviving husband or wife. (Arts. 1042, 1121.) *Succession of Bulliard*, 111 La. 186 (35 Sou. 508).

Art. 1047. See Art. 1012, 121 La. 499.

Where an intestate succession owes no debts, save those incurred in connection with the last illness, death and burial of the decedent, which are trifling compared with the assets, and the holders or creditors of which appear and disclaim any desire for an administration, and there are no minors, an administration should not be ordered at the instance

of one of eight of the major heirs, who applies to be appointed administrator, even though he claims the benefit of inventory. *Succession of Weincke*, 118 La. 207 (42 Sou. 776).

Art. 1049.

No question arises as to the divisibility or indivisibility of either the right of action to rescind the contract or of the mortgage, since primarily both belong wholly to the succession, and are to be administered for the benefit of the creditors. Nor does the bringing of such suit, whether to enforce a resolutory condition or the mortgage, involve any attack upon the acts of the *de cujus*. On the contrary, the purpose of the suit is the enforcement of a right written into such contracts by the law or secured by the convention of the parties. (Arts. 1049, 1058.) *Succession of Delanauville vs. Duhe*, 114 La. 62 (38 Sou. 20).

The *ex parte* resignation of an administrator with accounts to render, and its acceptance by the probate Judge, will be vacated when it appears that the alleged inability is not of such a nature as to prevent the officer from continuing his gestion. *Succession of Broadway*, 114 La. 493 (38 Sou. 430).

Refer to Arts. 1058, 1151, 1195, 1674, 2046.

Art. 1050. See Art. 1032, 129 La. 397.

Art. 1058. See Art. 1049, 114 La. 67.

Having been appointed administrator of the husband, he can by no acts of his own divest himself of the administration of the property. He cannot seek to have the property divided in two parts. His duty and powers authorized him to sell at probate sale so much of the property as was required to pay the debts. So long as there are debts of the community unpaid, the heirs of the wife have no right, and the administrator has no authority, to turn over the property to the heirs for partition among themselves; and the Court should not give its sanction to this being done. *Kremer vs. Kremer*, 121 La. 485 (46 Sou. 600).

Where the succession of the deceased wife owes no debts, and the heirs are present, the administrator has no standing alone to prosecute a suit attacking the transaction of the surviving husband with respect to the community

property. The debts having been paid, the duty of the administrator is to turn over the property, including the claim of the succession, if any there be, against the community, to the heirs, and close the succession as speedily as possible. *Miguez vs. Delcambre*, 125 La. 176 (51 Sou. 108).

Art. 1063.

The administrator having made payment without order of the Court, the provisions of Art. 1188 of the Civil Code did not apply to the case. If represented, or credit could be claimed in any direction, it should be sought by appellants themselves. *Zeigler vs. His Creditors*, 116 La. 251 (40 Sou. 693).

Refer to Arts. 116, 1064, 1184.

Art. 1064. See Art. 1063, 115 La. 258.

In the publication of the ten days' notice of the filing of the tableau of the administrator of the succession, neither the first nor the last day of the publication can count. *Succession of Miller*, 107 La. 561 (32 Sou. 80).

Art. 1069.

A charge made against a succession representative of any amount, which he contracted to pay a guaranty company for becoming surety upon his bond, cannot be sustained in the absence of an expressed provision of the law authorizing same. *Succession of Rabasse*, 51 La. An. 590 (25 Sou. 326).

The property mortgaged was properly assesed for the costs, including the commission of the administratrix and the fee of her counsel, as fixed by the Court of Appeal. *Succession of Haile*, 52 La. An. 1529 (27 Siu. 967).

Refer to Arts. 1194, 1200, 1683.

Art. 1071. See Art. 1021, 123 La. 831.**Art. 1085.**

It is also competent, in such a case, for the Judge to order an inventory to be made of the succession property; but there is no authority for an *ex parte* order, made *in limine*, directing the defendants to file a sworn statement of the money and property in their possession; nor is it competent to order the sequestration of the property of a

corporation upon the averment that the decement owned a majority or the whole of the stock. *Schwan et al. vs. Schwan et al.*, 52 La. An. 1183 (27 Sou. 678).

Refer to Arts. 1090, 2070, 2980, 2981.

Art. 1090. See Art. 1085, 52 La. An. 1183.

Art. 1100. See Art. 1102, 52 La. An. 65.

The placing by the notary of a word omitted from the will upon the margin thereof is an immaterial circumstance when the word can be ignored and the will stand; and he is not an intermeddler. *Dupuy vs. Esnard et al.*, 51 La. An. 798 (25 Sou. 534).

Refer to Art. 1578.

Art. 1101.

The word "form," as commonly used as the antithesis of "substance" in prescribing against "informalities" in public sales, refers to irregularities and illegalities, which do not reach matters that are of the essence of those contracts or prejudicially affect the substantial rights of parties who may be interested therein. The sale upon the first offering of the property of a succession for less than one-tenth of its value, according to the last appraisement, is a matter of substance, and not a mere informality. It cannot be sold for cash for less than two-thirds of the appraisement at the first sale. *Thibodeaux vs. Thibodeaux et al.*, 112 La. 906 (36 Sou. 800).

Refer to Arts. 1106, 1169, 1170, 3543.

Art. 1102.

The surviving partner of a commercial partnership will not be deemed an intermeddler because, on the dissolution of the partnership, the survivor collects debts due the partnership and makes sales of its property. But the surviving partner will be held to a faithful account. The surviving partner will not be relieved of his liability for the partnership property sold by him in block for less than its value, on the ground that with the proceeds of the sale he was enabled to compromise the partnership debts. *Cockerhan vs. Bosley et al.*, 52 La. An. 65 (26 Sou. 814).

Refer to Arts. 1100, 1103.

Art. 1103. See Art. 1102, 52 La. An. 65.

Art. 1106. See Art. 1101, 112 La. 906.

Art. 1110.

Article 1110, in case of public inventories, requires the witnesses to be "domiciliated in the place where the inventories are made." Thus, the Code draws a distinction between the residence and domicile of witnesses. *Oglesby vs. Turner*, 127 La. 1097 (54 Sou. 400).

Art 1111. See Act 140, 1888, p. 197.

Art. 1113.

A judgment of the Court removing from office a definitive syndic is appealable from suspensively, and pending the appeal the District Court is without jurisdiction to convoke a meeting of creditors to select his successor. The Court does not lose its jurisdiction over the insolvency itself, and the conduct of the syndic, pending the appeal. The creditors also are entitled to the conservatory remedies necessary to their rights in the interval. *State vs. Somerville*, 110 La. 734 (34 Sou. 757).

Art. 1115.

The existence of minor heirs does not invalidate a sale of succession property to pay debts; and where the purchaser, prior to the sale, had the title examined, and the absence from the record of a formal order appointing the administrator did not attract the attention of the attorneys who examined the title, the mere fact that he knew of the existence of the heirs did not show bad faith justifying the setting aside of the sale. *Thibodeaux vs. Barrow*, 129 La. 396 (56 Sou. 339).

Refer to Art. 1116.

Art. 1116. See Art. 1115, 129 La. 397.

Art. 1117.

A week is a fixed period of seven days, and the law does not require that the advertisement shall be made on the same day in each week. *In re City of New Orleans, Praying to Be Put in Possession*, 52 La. An. 1073 (27 Sou. 592).

The law is fulfilled when the advertisement appears "once a week" during the publication period. Sunday is a day of the week—the first day of the week. Its appearance, then, on Sunday is an appearance during the week of which Sunday is the first day. (See Art. 1167.) *Schenck vs. Schenck*, 52 La. An. 2103 (28 Sou. 302).

Art. 1121. See Art. 1042, 111 La. 186.

One of the two parties asking for the administration of the succession being the surviving wife, who is an heir, and the other being one who asserts that he is a creditor of the succession, the Court appoints the surviving wife and heir administratrix, as she has preference over any creditor. *Succession of Barber*, 52 La. An. 957 (27 Sou. 361).

Art. 1129. See Succession of Weeks vs. Administrator, 104 La. 577.

Art. 1135.

An administrator, making the heirs parties, has capacity to institute and prosecute a suit for a partition of property owned in indivision by the succession he represents and third persons. The heirs of a predeceased husband and father, who died without debts, are third persons *quoad* the succession of the lately deceased widow and mother which is under administration to pay debts contracted by her individually after the death of the husband. *Wilson vs. Wilson et al.*, 107 La. 139 (31 Sou. 643).

Refer to Art. 1453.

Art. 1138.

The surviving partner of a commercial partnership liquidating its affairs is without authority to pay debts alleged to be due by the deceased individually out of the partnership funds. The widow of the deceased partner and his succession cannot be called on to litigate such claims in the liquidation proceedings. The surviving partner is without right, under the express terms of the law, to receive commission for his services as such. *In re J. H. Curlee & Co.*, 118 La. 563 (43 Sou. 163).

Refer to Arts. 1139, 1142.

Art. 1139. See Art. 1138, 118 La. 563.

Art. 1142. See Art. 1138, 118 La. 563.

Art. 1146.

As amended by Act 197 of 1912, Art. 1146 reads as follows: Every curator of a vacant succession or of absent heirs is prohibited from purchasing, by himself or by means of a third person, any property, movable or immovable, intrusted to his administration, under the pain of nullity and responsibility for all damage caused thereby. Any executor, administrator or curator of vacant successions, or tutor may purchase at the sale of the effects of the deceased, whose estate he may represent, when he is the surviving partner in the community, or ordinary partnership, or an heir or legatee of the deceased, or any mortgaged property when he is the mortgage creditor, or any property incumbered with a vendor's lien when he has a claim secured by such vendor's lien; and all purchases so made shall be considered as valid and binding as though made by any disinterested third party, and shall have full force against minors, interdicted persons and married women.

As to the contention that his mother's purchase from Boatner must be considered as having been made for, and inuring to, his benefit, to the extent of his interest as heir, since she was holding the capacity of tutrix to him, and, therefore, could not acquire an interest adverse to him, if it had any force at all, it can be asserted only as against her in a contest between them. *Jones et al. vs. Jones et al.*, 51 La. An. 644 (25 Sou. 364).

Where an understanding exists that an administrator is, in his individual capacity, to share in the profits of a purchase of the property belonging to the succession, it is a sale in which the person who is administrator is interested, and void. This is so even afterwards the understanding that the administrator is to share in the profits be abandoned, and in point of fact he does not share in same. *Widow and Heirs of Willis vs. Berry et al.*, 104 La. 114 (28 Sou. 888).

The heirs may have an action against the administrator for damages for his failure to properly discharge his trusts; but it does not necessarily involve the validity of the sale. *Irwin vs. Flynn*, 110 La. 829 (34 Sou. 794).

Acting as auctioneer, he adjudicated the property to himself. This sale was the only attempted act of the administrator. He was discharged from his trust, and his sureties discharged. The defendants admitted the nullity of the sale, but pleaded the discharge by the heirs of the administrator and his sureties as an estoppel. *Held*, to be not well founded. *Tucker vs. Benedict*, 114 La. 203 (38 Sou. 142).

The plaintiff is bound to prove with legal certainty all the grounds on which he relies to annul a judicial sale, such as that the auctioneer was the real purchaser through a party interposed, or that the executor acted as the agent of the purchaser in bidding in the property; and, if the case be doubtful on the evidence, the presumption against official misconduct will prevail. *Higgins vs. Carabajal*, 123 La. 733 (49 Sou. 489).

Refer to Arts. 1153, 1156, 1790.

Art. 1150. See Art. 1063, 116 La. 254.

An administrator will not be dismissed after his final account has been filed when the dismissal cannot be of any benefit to heirs or creditirs. The penalty of twenty per cent. will be imposed for failure to comply with Art. 1150. Funds are not to be withdrawn from deposit without an order of the Court, and invested, even for account of some of the heirs. The penalty of ten per cent. for failure to file an annual account will not be imposed when asked for on opposition of the final account long after the asserted failure to file the account. The remedy was to apply to the Court for an order to file an account, and, on failure, to then demand the removal. *Succession of Conery*, 111 La. 114 (35 Sou. 479).

It is not required that the succession shall have suffered loss by the failure of the administrator to file an account every twelve months. The statute must be enforced strictly, though cases may arise manifestly not coming within its intendment. When the administrator has failed to file several accounts in one year, only one penalty can be imposed. *In re Dimmick's Estate*, 111 La. 656 (35 Sou. 801).

Article 1150 of the Civil Code is imperative, and leaves no discretion in the Courts to reduce the prescribed rate of

interest. *Conery vs. His Creditors*, 113 La. 420 (37 Sou. 14).

Plaintiffs had on them the onus of showing that defendant had received the whole amount, or some specific portion of it, in which event the latter would have been called on to account for it. They failed to establish their allegation, and judgment was rendered in favor of the defendant. *Succession of Hough*, 119 La. 435 (44 Sou. 190).

The mere failure of an administrator to render annual accounts will not justify his summary dismissal from office. To warrant such dismissal, it must be alleged and proved that the administrator has disobeyed an order of the Court to render his account. *Succession of Bertrand*, 127 La. 858 (54 Sou. 127).

Refer to Art. 1667.

Art. 1151. See Art. 1049, 114 La. 493.

The statute having been enacted in the interest of creditors and heirs, these may waive its benefits; and, therefore, the twenty per cent. penalty does not accrue on that part of the funds of the succession belonging to the executor or controlled by him as tutor, or belonging to those of the heirs who have consented to his acts. In the distribution of the funds, the sum accruing from the penalties must go to the heirs on whose share it has accrued. It can be imposed only in connection with funds actually received by the executor. It cannot be imposed on the amount of a debt due by the executor individually to himself officially. *In re Dimmick's Estate*, 111 La. 656 (35 Sou. 801).

Art. 1153. See Art. 1146, 104 La. 114.

Where such a procuration expressly declares that the executor intends to depart temporarily from the State, such intention is conclusively presumed to continue until the procuration is revoked or recalled. During the life of the procuration the executor is considered as present in the State, and is concluded in the courts of Louisiana from asserting a change of domicile to another jurisdiction; and the executors of a will made by him out of the State are in no better position. Such a will must be probated in the State of Louisiana. *Succession of Burbank*, 129 La. 529 (56 Sou. 480).

Refer to Arts. 1154, 1158.

Art. 1154. See all of Art. 1153.

Art. 1155. See Art. 336, 52 La. An. 1916.

Art. 1156. See Art. 336, 52 La. An. 1916; Art. 1146, 104 La. 115.

Art. 1158. See Art. 1153, 104 La. 115.

Art. 1160. See State vs. King, 113 La. 910.

By making an appeal rest upon an order of appeal to be granted by the Court which rendered it, authority is vested in that Court to determine primarily whether the order should be granted, leaving the legality of its action to be tested through an application for mandamus. *State vs. King*, 109 La. 161 (31 Sou. 121).

A judgment may be given directing that litigants claiming as heirs at law be put in possession, and rejecting the demands of the others for the probate of the will and their confirmation as executors. The latter are entitled to a suspensive appeal from such judgment upon giving proper bond; and the effect of such appeal is to maintain the sequestration of the property. *Succession of Drysdale*, 122 La. 38 (47 Sou. 367).

Refer to Art. 2634.

Art. 1162. See Art. 1166, 51 La. An. 1308.

Art. 1164. See Art. 1032, 129 La. 399.

Art. 1166.

The designation of an attorney for absent heirs is not an arbitrary requirement of law, but one that is necessarily dependent upon the circumstances of each particular case; and same is essential only in case a necessity therefor is shown during a pending administration of a succession. *Succession of Kellogg*, 51 La. An. 1304 (26 Sou. 262).

Refer to Arts. 1162, 1210, 1212.

Art. 1167.

As to immovable property, the only requirement is that the advertisement must appear once a week for the full term of thirty days. The law does not say thirty judicial days.

If it did, then Sunday and legal holidays would have to be excluded. Where the law has made no exception, it is not the province of the Court to supply one. *Schenck et al. vs. Schenck et al.*, 52 La. An. 2103 (28 Sou. 302).

Refer to Art. 1339.

Art. 1169. See Art. 1101, 112 La. 914.

Art. 1170. See Art. 1101, 112 La. 914.

Art. 1188. See Art. 1063, 116 La. 250.

Art. 1190.

This article was amended by Act 53 of 1900, p. 85, to read as follows: If a succession is so small, or is so much in debt, that no one will accept the curatorship or administration of it, the Judge of the place where the succession is opened, after having ordered an inventory of the effects composing it, shall appoint the Clerk of the District Court curator of said succession, who shall cause the effects to be sold and the proceeds to be applied to the payment of its debts; the whole to be done in as summary a manner as possible to diminish the costs; provided, that this article is not to apply to successions amounting to more than five hundred dollars.

Article 1190 is not restricted by its terms or purpose to vacant successions. A *bona fide* purchaser at a probate sale is not bound to look beyond the decree recognizing its necessity. *Huffman's Heirs vs. Hunter*, 127 La. 673 (53 Sou. 903).

Art. 1192.

Creditors of a succession are not estopped from demanding security from the heirs during the three months following their unconditional acceptance of the succession because, after an order of the Court recognizing them as heirs and placing them in possession, they have sued them as such in their petition and referred to the order placing them in possession. *Succession of Hart*, 52 La. An. 364 (27 Sou. 68).

Art. 1194. See Art. 1069, 51 La. An. 590.

Art. 1195. See Art 1049, 114 La. 497.

An administrator's bond, being a continuing one to cover the performance of duty until final discharge, is an entirety, and cannot be partially canceled before the end of the entire gestion. If the inventory of the succession includes property not belonging to it, or is made on a wrong legal basis, it can be corrected and made to conform to the law and the facts. Where the surety upon an administrator's bond is not insolvent, but simply insufficient, she should not be released and a new bond given. *Succession of Weeks vs. Administrator*, 104 La. 573 (29 Sou. 219).

Art. 1196. See Succession of King, 124 La. 818.**Art. 1200. See Art. 1069, 51 La. An. 590.****Art. 1210. See Art. 1166, 51 La. An. 1308.**

The further services of the attorney of absent heirs were dispensed with early in the settlement of the succession. The fee was fixed accordingly. *Succession of Welt*, 120 La. 57 (44 Sou. 921).

The administrator of an estate, some of the heirs of which reside elsewhere, who is made defendant in a proceeding by the widow of the deceased, the result of which is to have certain real estate inventoried as belonging to the succession, though standing in the name of the widow, decreed to belong to the widow, has a right to appeal from the judgment so rendered for the benefit of those whose estate he administers; and this though there be an attorney for absent heirs who does not appeal. *Succession of Graf*, 125 La. 198 (51 Sou. 115).

Refer to Arts. 1211, 1212.

Art. 1211. See Art. 1210, 125 La. 198.**Art. 1212. See Art. 1166, 51 La. An. 1306; Art. 1210, 125 La. 198.****Art. 1213. See Succession of Desina, 118 La. 282.****Art. 1221. See Succession of Kellogg, 51 La. An. 1308.****Art. 1227. See Chevalley vs. Pettit, 115 La. 419.**

Where a mother has made a distribution of her property among her children by means of acts of sale, which are

admittedly donations, and has died intestate, leaving no debts, and one of the heirs sues the others for collation, the case is appealable to the Supreme Court if the aggregate of the donations exceeds \$2,000. *Spaun vs. Helen*, 113 La. 230 (36 Sou. 949).

The mother does not fall within the terms of this article, even if she received the amount, which is not conceded. *Succession of Watt*, 122 La. 965 (48 Sou. 335).

The word "otherwise" refers to the provisions contained in the other articles relating to collation, and includes everything that may have been received by the heir from the parent himself, save where the latter has indicated unequivocably that it was intended as an advantage. *Sibley vs. Pierson*, 125 La. 480 (51 Sou. 502).

Refer to Arts. 1231, 1233, 1248.

Art. 1228.

It appears that he has received an amount much larger than the amount to which he had a right as an heir. The creditors have no grounds of complaint. In no event can they recover anything in the face of the fact that, from any point of view, the heir is not entitled to anything more from the succession of his father. The trustee has no right to any portion of the mother's estate. *Blank vs. Blank*, 124 La. 833 (50 Sou. 745).

Art. 1229.

The defendant individually and his ward are named in the policy of insurance as the beneficiaries. The heir for whom plaintiff claims was not born when the policy was issued, and is not entitled to an heir's portion of this policy, for the right of recovery is in the beneficiaries alone. The plaintiff is without right to have the amount collated on the ground that it was an advance to these heirs on their inheritance, and, in consequence, subject to collation. *Vinson vs. Vinson*, 105 La. 30 (29 Sou. 701).

The minor having come to the succession by the right of representation of her father, she was required to impute as a partial payment upon the legitime a sum of eight thousand dollars which her father had received as an advance thereon. *Miller vs. Miller et al.*, 105 La. 257 (29 Sou. 802).

The right of an heir to demand collation from his co-heirs is not barred by prescription of one year from the

date of the death of the *de cuius*. "Collation is always presumed where it has not been expressly forbidden." Hence, what has been so received must be collated or accounted for in the partition of the inheritance. Nor does it make any difference whether the advantage which a child has received has come to him, directly or indirectly, by donation pure and simple, by donation disguised as a sale, by a sale for an inadequate price, or otherwise. Every such advantage not equivocably given as an advantage is subject to collation. *Champagne vs. Champagne*, 125 La. 408 (51 Sou. 440).

Refer to Arts. 1230, 1231, 1232, 1233, 1240, 1246, 1248.

Art. 1230. See Art. 1229, 125 La. 408.

Art. 1231. See Art. 1229, 125 La. 408; Art. 1227, 125 La. 513.

Equality between heirs of the same degree is the cardinal principle of the Louisiana law of inheritance. No deviation is allowed from this rule save within the narrow limits and by pursuing the forms prescribed by law. If a father desires to prefer one child to another in the distribution of his property, he is bound to state his design expressly by declaring that the gift or legacy is intended as an advantage or extra portion, or using other equivalent terms. (*Montgomery vs. Chaney*, 13 La. An. 207.) *Clarke vs. Hedden*, 109 La. 159 (33 Sou. 116).

Art. 1232. See Art. 1229, 125 La. 408.

A grandfather left a will by which he decreed twenty thousand dollars to a minor grandchild, the daughter of a predeceased son, and the balance of his property he bequeathed to his children share and share alike. In this will he was dealing with his property in its entirety, and not specifically with reference to the disposable portion. The testator intended that the minor should only take twenty thousand dollars out of the whole estate, subject to the right of the minor, should she elect so to do, to claim her legitime. This claim being made on her behalf, she was not entitled to receive the legacy in addition to the legitime. *Miller vs. Miller et al.*, 105 La. 257 (29 Sou. 802).

Refer to Arts. 1233, 1501.

Art. 1233. See Art. 1232, 105 La. 257; Art. 1229, 125 La. 408, and 125 La. 513.

In order to establish the equality between heirs of the same degree, which is the cardinal principle of the Louisiana law of inheritance, an heir may sue his co-heir to set aside a donation, disguised as a sale, from the common ancestor to such co-heir. *Richard vs. Richard*, 129 La. 967 (57 Sou. 286).

In the absence of direct language bequeathing or donating property as an extra share or portion, the language used by the testator must be such as to unmistakably show an intention to confer an advantage. *Succession of Ford*, 130 La. —— (58 Sou. 141).

Art. 1235.

In the settlement, which covers much broader ground than does the settlement for the payment of debts, questions of collation and reduction are raised and passed upon, to whose solution creditors of the deceased are not necessary parties. Should matters take such shape as to give them any legal concern in the settlement, the most they could ask would be to be permitted, in proper cases, on their own application, to intervene. (Arts. 1235, 1264, 1453, 1504.) *Byrnes vs. Byrnes*, 115 La. 295 (38 Sou. 991).

The surviving husband in community administering the intestate succession of the deceased wife, and claiming the legal usufruct of her interest in the community property, cannot demand of one of the children of the marriage a collation of advances made to him during the existence of the community, nor can such administrator provoke a settlement of accounts between the children of the marriage by charging some of them with advances received during the life of the wife and mother. Such an accounting can be had only in partition proceedings between the forced heirs of the wife. *Succession of Hanna*, 126 La. 475 (52 Sou. 669).

Refer to Arts. 1236, 1264, 1504.

Art. 1236. See Art. 1235, 126 La. 475.

Art. 1240. See Art. 1229, 105 La. 263.

Art. 1241. See *Chevalley vs. Pettit*, 115 La. 419.

Art. 1246. See **Art. 1229, 125 La. 417**; see *Nereaux vs. Nereaux*, 114 La. 44.

Art. 1248. See **Art. 1227, 125 La. 513**; **Art. 1229, 125 La. 417**.

The property should not be subjected to collation. It was held subject to reduction, and to payment in money of the legitime of the younger sister; the older child being entitled, in fixing the amount of the legitime, to have \$6,000 deducted as a debt of the father. *Succession of Lamotte*, 110 La. 43 (34 Sou. 122).

A conveyance purporting to be a sale for a received consideration of cash and notes will be held to be a disguised donation where the evidence shows that no cash was paid, and that the notes were retained by the putative vendee, and was soon afterwards made the subject of a formal donation to him by the putative vendor. *Richard vs. Richard*, 129 La. 967 (57 Sou. 286).

Refer to Art. 2444.

Art. 1250. See **Art. 1253, 51 La. An. 311**.

In a suit by an heir against his co-heirs for the collation of disguised donations, after the plaintiff has made a *prima facie* showing that the transfers were gratuitous, the burden shifts to the defendants to show that the transfers were onerous. *Clarke vs. Hedden*, 109 La. 147 (33 Sou. 116).

Art. 1251.

Where a party is decreed the owner of property, it follows logically and legally that he or she is entitled to possession thereof, in the absence of a showing of a legal right of possession in another. Supposing collation to be due, the donee of property is entitled to retain possession of the immoveable pending settlement of the rights of forced heirs among themselves. *Lamotte vs. Martin et al.*, 52 La. An. 864 (27 Sou. 291).

Refer to Arts. 1255, 1268, 1277, 1278, 1282.

Art. 1253.

The parties in interest could, if they chose, make a basis for settling their rights and amounts other than the

amount showing total assets of the community by official inventory. In a matter of fact as related to an item with which plaintiff was charged, the preponderance of testimony was against him. In collations by taking less, the donee must take so much less from the surplus of the succession. *Levy vs. Levy*, 51 La. An. 311 (25 Sou. 86).

Refer to Art. 1250.

Art. 1255. See Art. 1251, 52 La. An. 868.

Collation is due only with respect to some gift or advantage which a forced heir has received from his parent or ascendant himself; but the obligation of any co-owner, whether he be a co-heir, the transferee of a co-heir, or otherwise, to account in a partition proceedings for so much of the property held in common, in excess of his share, as he or his authors may have appropriated is prescribed by rules which, though different, are equally as effective. *Sibley vs. Pierson*, 125 La. 480 (51 Sou. 502).

Refer to Arts. 1268, 1290, 1318, 1398.

Art. 1261.

Where the heir who holds property subject to collation has in due time announced his intention of collating in kind, he is not liable for the loss of the property, should it be destroyed without his fault. But we know of no law which would exempt an ordinary co-proprietor, wrongfully in possession of his co-owner's share of the property owned in indivision, from liability for its loss. *Sibley vs. Pierson*, 125 La. 516 (51 Sou. 502).

Art. 1264. See Art. 1235, 115 La. 295.

Art. 1268. See Art. 1251, 52 La. An. 868; Art. 1255, 125 La. 516.

A pledge is a privilege with the right of retention of the property pledged. This is precisely the lessor's right. The right of retention is recognized in a number of articles of the Civil Code. (Arts. 1268, 2740, 3178.) *Villere et al. vs. Succession of Shaw*, 108 La. 73 (32 Sou. 196).

Refer to Arts. 2740, 3178.

Art. 1277. See Art. 1251, 52 La. An. 868.

Art. 1278. See Art. 1251, 52 La. An. 868.

Art. 1282. See Art. 1251, 52 La. An. 868.

Art. 1283. See Sibley vs. Pierson, 125 La. 516.

Art. 1289. See Art. 894, 115 La. 407.

According to this article, it behooves anyone against whom an act of partition is directed by joint owners to set up objections thereto, either by answer or by some exception other than an exception of no cause of action. *Succession of Glancey*, 108 La. 414 (32 Sou. 356).

Heirs have the legal right to insist upon the partition in entirety of the property inherited by them. They cannot be forced to a partition of specific properties in successive actions. In such suit all properties, wherever situated, must be brought in for partition. *McGuire vs. Fluker*, 112 La. 76 (36 Sou. 231).

Partition by lictitation would put at naught the statute (Act 152, p. 99, of 1884) enacted for the protection of the survivor of the community. The evident intention was to enable the survivor to retain his property, together with the property over which it is enacted that he or she shall hold the usufruct. The property is divisible in kind. The right may be sold. It cannot, however, be partitioned by lictitation without defeating the purpose of the enactment granting the usufruct. *Succession of Glancey*, 112 La. 430 (36 Sou. 483).

The Court is of the opinion that the article has some flexibility; and, when a reasonable temporary delay is asked for on good and sufficient grounds, the trial Court should at least hear evidence in support of the prayer, subject to its legal effect, in the exercise of judicial discretion. *Succession of Becnel*, 117 La. 744 (42 Sou. 256).

Refer to Art. 1320.

Art. 1290. See Art. 1255, 125 La. 509.

Art. 1295. See Bryan vs. Bonvillian, 111 La. 454.

An action for a partition cannot be prescribed against as long as the property remains in common and such community is acknowledged or proved; but such an action may be barred by continued and uninterrupted separate possession of one of the heirs or joint owners for thirty years. (Arts. 1304, 1305.) In case of minors, where the formalities prescribed by law have not been fulfilled, the partition

is considered as provisional, and it is not necessary to sue to rescind it, but a new partition may be demanded for the least lesion. (Arts. 1399, 1400.) *Rhodes vs. Cooper*, 113 La. 600 (37 Sou. 527).

The drawing of the lots is an essential formality in a judicial partition in which a minor is interested; and the failure to observe this formality renders the partition merely provisional. The effect of a provisional partition is to give to the parties the right to the fruits of the things which have fallen to them respectively. The action of the minor for a definitive partition is prescribed by either five or ten years from emancipation or majority. (Arts. 2221, 3542.) *Rhodes vs. Cooper*, 118 La. 299 (42 Sou. 943).

Refer to Arts. 1296, 1304, 1305, 1367, 1372, 1373, 1399, 1400, 1413, 1415, 1785, 2221, 3542, 3543.

Art. 1296. See Art. 1295, 113 La. 607.

Art. 1298. See Female Orphan Society vs. Y. M. C. A., 119 La. 285.

Art. 1300. See Female Orphan Society vs. Y. M. C. A., 119 La. 285; see Art. 1012, 128 La. 1061.

Art. 1301. See Art. 1289, 112 La. 431; Art. 1012, 128 La. 1061; Art. 1304, 125 La. 506.

Art. 1304 See Art. 1295, 113 La. 600.

The prescriptions of five, ten and twenty years have no application to parties owning property in common by succession as co-heirs, nor to parties owning property in common with heirs through the acquisition by them from particular heirs of their undivided interest in the succession. No prescription less than thirty years can be invoked. (Arts. 1305, 1306, 1320, 1321.) *Sibley vs. Pierson*, 125 La. 506 (51 Sou. 502).

Refer to Arts. 1301, 1305, 1306, 1320, 1321.

Art. 1305. See Art. 1295, 113 La. 600; Art. 1304, 125 La. 506.

The rule that simulated contracts of a father, when attacked by his forced heirs, are only to be set aside in so far as they impair the legitime of the heirs does not seem

to apply to the case of a simulated sale of land or slaves to a favorite child. (Arts. 1305, 1310, 1326, 1488, 2419.) *Clark vs. Hedden*, 109 La. 158 (33 Sou. 116).

Refer to Arts. 1310, 1326, 1488, 2419.

Art. 1306. See Art. 1304, 125 La. 506.

Art. 1310. See Art. 1305, 109 La. 158.

Art. 1312. See Art. 363, 112 La. 716.

While the law requires that a family meeting shall fix the terms upon which the interest of a minor co-proprietor of real estate shall be sold preparatory to a partition of the common property by licitation, it will suffice that it ratified and approved of the terms upon which same is made, if done contemporaneously therewith. *Succession of Richardson vs. Heirs of Richardson et al.*, 52 La. An. 1402 (27 Sou. 990).

The condition precedent to the suit for a partition is the advice of a family meeting. It is not inconsistent with the authority to sue, as provided in the Code of Practice, Arts. 1023 and 1024. They can well be construed together as one controlling law when suit is brought in the name of the minors for the partition of the effects of the succession. *Vincent vs. Vincent*, 105 La. 34 (29 Sou. 701).

Art. 1313.

A married woman, though a minor, can, when aided and assisted, sue for the partition of property in which she is interested, without being authorized so to do, on the advice of a family meeting. *Tobin vs. U. S. Safe Deposit & Savings Bank*, 115 La. 366 (39 Sou. 33).

Art. 1314. See Art. 345, 120 La. 41.

Where one of the co-owners bringing suit for a partition against minor joint owners has married the husband of a deceased sister, and is joined in such suit by her husband to authorize and assist her, the husband, though tutor of the minor children issue of this marriage with his first wife, cannot legally represent the minors as defendants in such suit. *Succession of Becnel*, 117 La. 744 (42 Sou. 256).

Where two of the parties owning property in indivision with a minor file a petition praying for a sale to effect a partition, the minor occupies the position of a defendant in the proceedings, though he be a co-plaintiff in the peti-

tion, and though his tutor expresses his willingness to have the partition made. A family meeting's approval or disapproval could not control the right of the other co-owners to demand the partition. *Carrollton Land & Imp. Co. vs. Eureka Homestead Society*, 119 La. 692 (44 Sou. 434).

Art. 1315. See Art. 75, 122 La. 1045.

Art. 1318. See Art. 1255, 125 La. 467.

Art. 1320. See Flower, King & Putnam vs. Beasley, 52 La. An. 2057; see Art. 1289, 112 La. 96; Art. 1304, 125 La. 506.

Partition among co-heirs is in no wise inconsistent with the continued possession of the administrator. *Succession of Wiemann*, 106 La. 388 (30 Sou. 893).

Art. 1321. See Art. 1304, 125 La. 506.

Art. 1323.

Where, in what purports to be a partition proceeding, the interest of a minor alone in the property is sold at a private sale, the purchaser acquires no title. The law requires a sale, whether public or private, to effect a partition of property in which a minor is interested, to be made of the whole property; and this whether the purchaser be a co-owner or a third person. *Moore vs. Gulf Refining Co.*, 124 La. 607 (50 Sou. 596).

Refer to Arts. 1326, 1339.

Art. 1324. See Thibodeaux vs. Thibodeaux, 112 La. 914.

It has been held that property offered for sale to effect a partition cannot be sold, at the first offering, for less than two-thirds of its appraised value. (Arts. 1324, 1325, 1326.) *Sibley vs. Pierson*, 125 La. 521 (51 Sou. 502).

Art. 1325. See Art. 1324, 125 La. 521.

Where heirs have claims for improvements enhancing the value of land belonging to the estate, such improvements should be appraised separately immediately before or after the partition sale. *Faure vs. Faure*, 117 La. 204 (41 Sou. 491).

Refer to Art. 1326.

Art. 1325. See Art. 1305, 109 La. 159; Art. 1323, 112 La. 914; Art. 1324, 125 La. 521; Art. 1325, 117 La. 205.

Art. 1327. See Art. 1289, 112 La. 102.

Art. 1336.

This article is restricted in its effect to partitions made between majors exclusively, which will be seen by comparison with Art. 1341. *Succession of Richardson vs. Heirs of Richardson*, 52 La. An. 1405 (27 Sou. 890).

Refer to Art. 1341.

Art. 1337.

The exercise of the paramount rights of the other joint owners would force the subordinate rights of the mortgage creditor to yield; and so it is in the case of the exercise of the paramount rights of the State. *Flower, King & Putman vs. Beasley*, 52 La. An. 2057 (28 Sou. 322).

Refer to Art. 1338.

Art. 1338. See Art. 1337, 52 La. An. 2057.

If two debtors bound only jointly have mortgaged their common property in its entirety for the whole debt, each of the debtors is bound with the other, the mortgage being indivisible. If one pays the whole debt, subrogation takes place in his favor. *Randolph vs. Stark*, 51 La. An. 1121 (26 Sou. 59).

Refer to Arts. 1382, 1383, 2013, 2112, 2161.

Art. 1339. See Art. 1167, 52 La. An. 2104; Art. 345, 118 La. 756; Art. 1323, 124 La. 609.

Where a minor is concerned, there can be no consent decree ordering the partition of property by licitation. There must be proof adduced that the property is indivisible, or else it cannot be conveniently divided in kind, before he can authorize a sale at auction to effect a partition. *Mackin et al. vs. Wilds*, 106 La. 1 (30 Sou. 257).

A private sale by the surviving husband of a half interest of his minor son in bank shares, made without an order of the Court issued on the advice of a family meeting, is a nullity. *Leury vs. Mayer*, 122 La. 487 (47 Sou. 839).

The Courts cannot recognize or give effect, as against minors and as against judicial averments and admissions by deed, to verbal understandings concerning the partition of real estate in which such minors are interested. *Fahey vs. Fahey*, 128 La. 503 (54 Sou. 973).

Refer to Arts. 340, 1341.

Art. 1340. See Art. 1339, 128 La. 511.

Art. 1341. See Art. 1336, 52 La. An. 1405; Art. 1339, 128 La. 511.

The authority of the Judge to convoke a family meeting to fix the terms of credit and security on which the interest of minors in property partitioned is to be sold is not conditioned upon such convocation having been made at the special instance and request of the tutors and curators of those minors. The Court may order it *ex officio*. *Tobin vs. U. S. Safe Dep. & Sav. Bank*, 115 La. 366 (39 Sou. 33).

It is the province of the judgment ordering the sale to effect a partition to fix the terms. (Arts. 1341, 1342, 1345.) *Doucet vs. Fenelon*, 120 La. 41 (44 Sou. 908).

Refer to Arts. 1342, 1345.

Art. 1342. See Art. 1341, 120 La. 41.

Art. 1343. See Thompson vs. Vance, 110 La. 37.

Where the purchaser at a Sheriff's sale does not pay the price, the situation, so far as the title to the property is concerned, is just as if he had not bought at all; and yet, if he pays the price, his ownership dates from the adjudication. And so with the heir who purchases at the succession sale and avails himself of the privilege extended in Art. 1343. *Crochet vs. McCamant*, 116 La. 9 (40 Sou. 474).

Refer to Arts. 2021, 2025, 2028, 2041.

Art. 1345. See Art. 1341, 120 La. 41.

Art. 1347. See Rhodes vs. Cooper, 113 La. 607.

Art. 1350.

Where plaintiffs sued to be recognized as joint owners and for a partition, and the judgment ordered the defendant to account for rents, he is not estopped to set up in the partition proceedings claims for disbursements for taxes, in-

surance and necessary repairs. *Sharp vs. Zeller*, 114 La. 550 (38 Sou. 449).

In a partition of the separate estate of the deceased father, the accounts to be settled are those between the heirs and his succession; and claims of the heirs against the mother or against each other individually are foreign to the issue. *Faure vs. Faure*, 117 La. 204 (41 Sou. 494).

Art. 1359.

Where a mother and tutrix, in anticipation of her second marriage, has made, through their undertutor, a settlement, or *dation en paiement*, with her children, in the form of a donation, the parties have the right, on finding the form of the act an obstacle in the way of the sale of the property, to set aside the donation, sell the property, and apply the price to the payment of the children. The children of the second marriage have no right under these circumstances to force a collation from those of the first by reason of this donation. *Succession of Lanphier*, 104 La. 384 (29 Sou. 122).

Art. 1367. See Art. 1295, 118 La. 301.

Art. 1371. See *Benedict et al. vs. Holmes*, 104 La. 534; *Rhodes vs. Cooper*, 113 La. 607.

Art. 1372. See Art. 1295.

Art. 1373. See Art. 1295, 118 La. 304.

Art. 1380.

Where property has been sold to effect a partition by ligation, and gone into the hands of third parties, the partition will not be rescinded by reason of the discovery made, since the same, of the omission from the partition of property of insignificant value. *Wolverton et al. vs. Stephenson et al.*, 52 La. An. 1147 (27 Sou. 674).

If property be omitted of insignificant value, it may give rise to the necessity of making a supplementary partition, without the necessity arising of repartitioning all the property previously divided. The rights of the parties are reserved to recover property not covered by the proceedings heretofore had. *Succession of Sallier*, 115 La. 97 (38 Sou. 929).

Refer to Art. 1401.

Art. 1381. See Art. 77, 107 La. 742.

Art. 1382. See Art. 1338, 51 La. An. 1132.

Art. 1383. See Art. 1338, 51 La. An. 1132.

Art. 1398. See Art. 1255, 125 La. 467.

The parties having made, as the basis of their voluntary partition, a statement of the assets and liabilities of the community as of date of the institution of the suit by the husband for a separation from bed and board, plaintiff cannot complain that the partition should have been made on the basis of the status of the community at the date of the judgment of separation, in the absence of evidence tending to show that her share would have been greater if the partition had been made on the latter basis. *Haddad vs. Haddad*, 120 La. 219 (45 Sou. 109).

Refer to Art. 2432.

Art. 1399. See Art. 1295, 113 La. 600; Art. 75, 122 La. 1045.

Art. 1400. See Art. 1295, 113 La. 600, and 118 La. 302.

A family meeting may recommend that specially designated property held in indivision with owners who are not heirs be partitioned; and, if the order be complied with more than five years after, the irregularities of form will be cured. *Sallier, Curator, vs. Rosteet et al.*, 108 La. 378 (32 Sou. 383).

Art. 1401. See Art. 1380, 52 La. An. 1152, and 115 La. 101.

The necessity of making a new partition of property omitted would not then have the effect of invalidating an already made partition. *Sallier, Curator, vs. Rosteet et al.*, 108 La. 383 (32 Sou. 383).

Art. 1412.

Mrs. Marshall had obtained a judgment recognizing her legacy of twenty-five acres of land on the plantation, and that she was not a party to the partition proceedings. Should she attack it, all parties should get the benefit of the decision. A partition ought not to stand as to one and

be set aside as to another. *Frith, Tutrix, vs. Pearce, Tutor*, 105 La. 201 (29 Sou. 809).

Art. 1413. See Art. 1295, 113 La. 608.

An action for the rescission of a partition is prescribed by five years, which commences against minors after their majority. (Arts. 3542, 1413.) *Rhodes vs. Cooper*, 113 La. 604 (39 Sou. 527).

Refer to Art. 3542.

Art. 1414. See Art. 1295, 118 La. 303.

Art. 1415.

The rights of the seller would remain unaffected by a special agreement between the parties. He would not be called on to know the circumstances of the different payments. He would stand on the original contract rights, no matter how much the purchasers might alter their relation *inter se*. (Arts. 1415, 1416.) *Stubbs vs. Lee*, 105 La. 648 (30 Sou. 169).

Refer to Art. 1416.

Art. 1416. See Art. 1415.

Art. 1422.

Where the administration of a succession has been closed, and many years afterwards the heirs of the deceased, suing as heirs, recover property, a creditor of the deceased will not be permitted to reopen the succession and bring the property thus recovered under administration as belonging to the succession, and himself appointed administrator. The heirs take by inheritance the property thus recovered from adverse claimants. But this is not to say that they take the property free from the pursuit of the creditors of the succession. *Succession of Aronstein*, 51 La. An. 1052 (25 Sou. 932).

Art. 1432.

No matter what may be the contract between private individuals, the State is not bound thereby if not in exact accordance with its statutes, any more than are creditors of a succession concerned by any private arrangement made as between themselves by the heirs of the deceased. *Williams vs. Sheriff & Tax Collector*, 107 La. 101 (31 Sou. 926).

Art. 1453. See Art. 1235, 115 La. 295.

Art. 1456.

An unconditional acceptance of a succession by heirs does not date back by relation to the date either of the death of the author or to the date of a prior acceptance under benefit of inventory in computing the three months after unconditional acceptance during which the right of creditors exists under the law to exact security from heirs. *Succession of Hart*, 52 La. An. 364 (27 Sou. 69).

Art. 1467.

A donation *inter vivos* must divest in the present and irrevocably the interest of the donor in behalf of the donee. Any reservation of interest or retention of control by the donee nullifies the donation. When it is stipulated that ownership is not to pass until the death of the donor, it is a donation *mortis causa*; and, being verbal, such a transaction is an attempt to make a verbal will; and, hence, nugatory. (Arts. 1467, 1574, 1576, 1595.) *Succession of Sinnot vs. Bank et al.*, 105 La. 712 (30 Sou. 233).

Refer to Arts. 1468, 1469, 1529, 1533, 1574, 1576, 1595.

Art. 1468. See Art. 1467, 105 La. 712.

A donation *inter vivos* of real estate from a father to a daughter may be rescinded or modified at any time by the mutual consent of the parties. In such a case the return of the property cancels the donation, and the presumptive forced heirs of the parties have no standing to complain of the retrocession of the property. *Quirk vs. Smith*, 124 La. 11 (49 Sou. 728).

The law does not require that a donation, when gratuitous, remunerated or onerous, the value of the thing given, of the services intended to be compensated or of the charges imposed should be fixed and stated in the act. *Hearsey vs. Craig*, 126 La. 824 (53 Sou. 17).

Refer to Arts. 1534, 1535, 1559, 2239.

Art. 1469. See Art. 1467, 105 La. 714.

Art. 1470.

A wife, donee of her husband's creditor, made by the effect of the donation, becomes the creditor of her husband.

(Arts. 2445, 1470.) *Petetin vs. His Creditor*, 51 La. An. 1660 (26 Sou. 471).

Donations and bequests are permissible to trustees for educational, charitable or literary purposes, or for the benefit of institutions, existing or to be founded, the object of which is to promote education, literature or charity. (See Art 124 of 1882.) But this permission is restricted to educational, charitable and literary objects within the State of Louisiana. Cities may also receive donations. *Succession of Meunier*, 52 La. An. 80 (26 Sou. 776).

The whole will is not null because a particular part is null; but this particular donation will be reduced to the amount allowed by the statute in view of Art. 1470, permitting all persons to receive by donation *mortis causa* except such as the law expressly declares incapable. *Succession of Elmore*, 124 La. 91 (49 Sou. 989).

Refer to Art. 2445.

Art 1473.

The legatees existed at the time the testator died, and possessed the heritable quality, the exercise of which was merely suspended until permission to accept was had from the counsel of the State. The capacity to receive was one thing, and existed; the exercise of it was another thing, and was merely inoperative until the counsel of the State acted. *Succession of Meunier*, 52 La. An. 93 (26 Sou. 776).

The capacity to take under a donation *mortis causa* must be adjudged of at the time if the opening of the succession of the testator, which means at the time of his death. *Succession of Vance*, 110 La. 760 (34 Sou. 767).

Refer to Art. 1486.

Art. 1476.

The collateral heirs of the donor cannot attack the donation of checks and money on account of relative nullities, such as the minority of the donor or the disposition *omnium bonorum*. The father, as forced heir, has no interest to annul donations made by his daughter to her husband in a case where the law reserves to him a larger share than he would have inherited had such donations not been made. *Succession of Desina*, 123 La. 469 (51 Sou. 496).

Art. 1477. See Art. 916, 111 La. 98, and 119 La. 105.

Art. 1481. See Succession of Filhiol, 119 La. 1011; Thielman vs. Gallman, 119 La. 354; Ducasse's Heirs vs. Ducasse, 120 La. 738; Richard vs. Charlot, 122 La. 499.

Plaintiff and defendant had lived in open, public concubinage for more than twenty years, and a family of eleven children have been born of their illicit intercourse. Any claims she may make for services as house servant and laborer are so interwoven and blended with her remuneration as a concubine that they are practically indistinguishable. *Lucinda Simpson vs. Oliver P. Normand et al.*, 51 La. An. 1355 (26 Sou. 266).

Where the only parties to an act of sale of real property are the vendor and the vendee, the ownership of the property passed to the vendee. The children of a third person cannot, by means of parol evidence, have the property taken from the vendee and vested in their father on the ground that the act evidenced a disguised donation by him to the vendee, as he had furnished her the money with which the property was bought. The donation to her of the money might be subject to attack, but her ownership in the property would stand. *Westmore vs. Harz*, 111 La. 306 (35 Sou. 578).

Concubinage imports something more than the mere illicit commerce of a man and a woman; it imports the maintenance of a status resembling marriage. The word "open" in Art. 1481 has the meaning of not secret; without concealment or disguise; plain and aboveboard; so that a concubinage maintained under the cloak of an innocent relation, and sought to be kept secret, will not give rise to the incapacity pronounced by that article. *Succession of Jahraus*, 114 La. 455 (38 Sou. 416).

The article of the Code (1481) must be read in connection with Art. 12, which provides that "whatever is done in violation of a prohibitory law is void, although the nullity be not formally directed." Furthermore, "every disposition in favor of a person incapable of receiving shall be null." *N. Y. Life Insurance Co. vs. Neal*, 114 La. 652 (38 Sou. 485).

A donation *mortis causa* in favor of one with whom the testator has lived in open concubinage must, at the instance of the heirs at law, be reduced to one-tenth part of the value of the estate, payable from the movables. Where parties are living in concubinage, their acknowledgment of the fact, when voluntary and unnecessary, is sufficient to establish its openness. *Succession of Landry*, 114 La. 830 (38 Sou. 575).

The deceased, nominally the insured, did not expend a cent on the policy. She (the beneficiary of the policy) rendered faithful services to the deceased, and when he died she pledged her policies in order to obtain for him a decent funeral. He made her no donation. Under her investment, she acquired a right to the policy. *Succession of Johnson*, 115 La. 20 (38 Sou. 880).

The marriage of two people who have lived in concubinage has the effect of destroying the legal status created by the concubinage; so that a donation of an immovable made by the man to his concubine will be viewed after the marriage in the light of a donation made by the man to one who was not his concubine; and, while it may be voidable, it is not void. *Beauchamp vs. Levy et al.*, 129 La. 234 (55 Sou. 775).

Where the testator names the same person as his universal legatee and sole executor, the intention that such person shall have the estate over and above any amount which might otherwise be required for the payment of an executor's commission is unmistakable; and the fact that such intention is defeated, or partially defeated, with respect to the legacy, furnishes no basis for the argument that the commission should be withheld. *Succession of Filhiol*, 123 La. 497 (49 Sou. 138).

Refer to Arts. 11, 1491, 1686, 1754.

Art. 1486. See Art. 1473, 110 La. 774; see Hedges' Heirs vs. Kell, 125 La. 97.

Art. 1487. See Hedges' Heirs vs. Kell, 125 La. 97.

Art. 1488. See Art. 1305, 109 La. 158.

Art. 1489.

An attack made upon the will on the ground of incapacity of the legatee to receive the benefit of bequests

therein made, because they are the wife and children of the doctor who professionally attended the testatrix during the sickness from which she died, and are therefore reputed to have been interposed for him, cannot be sustained in the absence or satisfactory evidence that the same was made during that sickness. *Succession of Bidwell*, 52 La. An. 744 (27 Sou. 281).

There is no good reason why the university should not receive donations for its medical department. The prohibition to private corporations to receive testamentary gifts is strictly in line with this article. But we imagine the law would look rather with favor upon gifts to a university. *Succession of Hutchinson*, 112 La. 694 (36 Sou. 639).

Where a universal legacy is attacked on the ground that the legatee is a minister of religious worship, who professionally attended the testatrix in her last illness, and that the will was made during that period, the petition discloses no cause of action in the absence of allegation that there was no tie of consanguinity between the testatrix and the legatee. *Succession of Herber*, 117 La. 239 (41 Sou. 559).

This article has not been repealed by Act No. 2 of 1881, Second Session, or otherwise. Hence, where the conditions stated exist, a universal legacy in favor of the attending minister is void; nor does it affect the question that the will is made in another State, where the testatrix and the minister live, and where such dispositions are permitted. *Succession of Herber*, 128 La. 112 (54 Sou. 579).

Refer to Art. 1491.

Art. 1490. See *Succession of Meunier*, 52 La. An. 92; *Succession of Baker*, 129 La. 80.

Art. 1491. See **Art. 1489**, 52 La. An. 746; **Art. 1481**, 114 La. 661.

He was at that time worth between forty and seventy-five thousand dollars, and he gave her two thousand eight hundred and seventy-eight dollars. If this amount is more than he was entitled to donate under the then existing law, the donation was not null, but reducible, under this article. *Westmore vs. Harz*, 111 La. 314 (35 Sou. 578).

Art. 1492. See *Succession of Jacobs*, 109 La. 1022.

Art. 1493. See Art. 903, 104 La. 453; Reems vs. Dielmann, 111 La. 99; Hearsey vs. Craig, 126 La. 832; Succession of Drysdale, 130 La. —.

When an unmarried person of full age makes a donation of real property to another, and later marries, and children are born of the marriage, such children, after the donor's death, have no recourse upon the property so donated on the plea of the impairment, by the donation, of their legitime, as forced heirs. Otherwise, if the donation were made subsequent to the marriage. *Grasser vs. Blank*, 110 La. 494 (34 Sou. 648).

He is at liberty to dispose of the whole property, subject, however, to the rights of these heirs, if they feel themselves aggrieved, to have the will set aside to the extent necessary to secure to them, as forced heirs, the legal portion coming to them. They are at liberty to make this claim only if they think proper to do so. *Miller vs. Miller et al.*, 105 La. 262 (29 Sou. 802).

Refer to Arts. 1494, 1495.

Art. 1494. See Art. 903, 104 La. 447, and 123 La. 481; Art. 1493, 105 La. 262.

Art. 1495. See Art. 903, 104 La. 447; Art. 1493, 105 La. 262.

Art. 1496. See Art. 903, 104 La. 447.

Art. 1497. See Cox vs. Lea's Heirs, 110 La. 1035.

A notarial act between father and daughter purporting on its face to be an act of sale to the daughter cannot be set aside by the father on the ground that the act evidenced in reality a donation to his daughter, by which he had divested himself of everything he had, when the father has discounted the notes of his daughter to a third person and the property has passed to a third purchaser in good faith. *Lawson vs. Connolly*, 51 La. An. 1753 (26 Sou. 612).

An act signed by a married man and his wife, by which the former divested himself of all his property, real and personal, in favor of another, in consideration of the transferee's promise "to take the transferor and his wife and maintain and provide and care for them as a father careth for his children during their natural lives," is null and void.

The property transferred in this case was community property. The nullity was invoked by the husband only after the wife's death. The contention that at least one-half the property could not be attacked is not well founded. *Harris vs. Wafer*, 113 La. 822 (37 Sou. 768).

The claim of the donor who has given away his money in violation of this article does not so follow the money into the hands of a third person as to operate as a lien upon the property in which the same has been invested. Liens exist in this State only when created by law, and there is no law creating a lien in such a case. *Ackerman vs. Larmer*, 116 La. 102 (40 Sou. 581).

Collateral heirs have no standing to attack for fraud, or as simulated, or as a donation made in violation of this article, a contract made by their *de cujus*, and fully executed by the other contracting party. *Thielman vs. Gahlman*, 119 La. 350 (44 Sou. 123).

The objection that the donation was null because it embraced all of the property of the donor is one that cannot be raised by collateral heirs. *Succession of Desina*, 123 La. 481 (49 Sou. 23).

An act of donation by a widow of all her property to her children, reserving none for her subsistence, is void, notwithstanding the obligation of the children to support her for life. *Rocques vs. Freeman*, 125 La. 61 (51 Sou. 68).

Where a conveyance, purporting to be a remunerative and an onerous donation, is sought to be annulled by the forced heirs of the donor under this article, the burden rests upon the plaintiffs to prove that the donor has not reserved enough for her subsistence, and that the value of the property donated exceeds by one-half that of the services intended to be compensated and of the charges imposed. *Hearsey vs. Craig*, 126 La. 824 (53 Sou. 17).

An understanding by which a widow in community, owning an undivided half interest and enjoying the usufruct of the other half interest, is to divest herself of her entire estate, and the two children are to become the owners in consideration of the obligation assumed by one of the children to assure his mother a home in the house in which they have been living on one of the lots free of rent, charges and taxes, is null and void. *Jaco vs. Jaco*, 129 La. 621 (56 Sou. 615).

Refer to Arts. 1513, 1514, 1900, 2236.

Art. 1501. See Art. 1232, 105 La. 261; Art. 1233, 130 La. —.

Art. 1502. See Hearsey vs. Craig, 126 La. 836; see Art. 1509, 112 La. 643.

Where a testator leaves the residue of his property to his wife, and the total donations are in excess of two-thirds of his property, the property which is the subject of the particular legacy is not to be reduced by the action of reduction of a forced heir if the value of the residuum does not fall short of the legal reservation. *Succession of Jacobs*, 104 La. 447 (29 Sou. 241).

The right to reduce is not in suspense until the simulation is decreed; for the simulation is a mere shadow with nothing about it to prevent the heir from asserting his right to the legitime. *Cox et al. vs. Von Ahlefeldt et al.*, 105 La. 544 (30 Sou. 175).

A will by which a testator, whose power of disposal is limited, gives to a particular person in general terms all that the law will permit him to give, and then proceeds to give the same person the entire residue of his estate, evinces an intention to give to the person in question all that by law he is permitted to give. *Gueydan et al. vs. Montague et al.*, 109 La. 38 (33 Sou. 61).

Act No. 5 of 1884, which grants the forced heirs the right of canceling absolutely and by parol evidence the simulated contracts of those from whom they inherit, and declares that they shall not be restricted to their legitime, establishes a rule of evidence, not a rule of property. It relieves the forced heirs from the restriction which the law had placed upon their ancestor himself as to the character of evidence which he is permitted to use. *Wells vs. Goss*, 110 La. 348 (34 Sou. 470).

The rule which denies to the creditor the right to assail the rights of his debtor committed prior to the creation of his debt has no application to the right of action of the forced heirs for the reduction of an excessive donation which, though arising only upon the death of the donor, relates back to the date anterior to the donation. A forced heir is not estopped to attack to the extent necessary to protect his legitime. *Jones vs. Jones*, 119 La. 677 (44 Sou. 429).

The forced heirs of the husband have a standing in court (to the extent necessary to protect their legitime) to attack the title to property acquired in the name of the wife, and alleged to have been paid for with the separate funds of the husband. *Succession of Graf*, 125 La. 204 (51 Sou. 115).

Refer to Arts. 1503, 1504, 1505, 1506, 1507, 1712, 1713, 1723, 2239.

Art. 1503. See Art. 1509, 112 La. 654; Art. 1502, 119 La. 683; *Hearsey vs. Craig*, 126 La. 832.

Art. 1504. See Art. 940, 105 La. 544; Art. 1502, 110 La. 353, and 119 La. 684; Art. 1235, 115 La. 295.

Though collateral heirs have no capacity to attack a donation or voluntary alienation of property made by one from whim, under the law, they are entitled to inherit, such incapacity does not extend to the case of an involuntary alienation, where the property is alleged to have been wrested from the *de cujus* by force; for in such case the heirs, whether collateral or forced, in seeking to recover the property, are attempting, not to defeat the purpose of the owner in exercising his legal rights, but to vindicate those rights, as well as the rights which the law gives to the heirs themselves to inherit from the owner the property of which the latter had not voluntarily disposed, and which, therefore, belonged to him at the time of his death. *Grandchamp vs. Billis' Heirs*, 121 La. 340 (46 Sou. 348).

Refer to Art. 1746.

Art. 1505. See Art. 1021, 123 La. 835; Art. 1502, 125 La. 206; *Succession of Bothick*, 52 La. An. 1879; *Stockwell vs. Perrin*, 112 La. 655.

The legitime or portion reserved to the surviving father is determined by adding the value of the property donated to the value of the property belonging to the donor's estate, and then deducting funeral expenses, law charges, and the debts of the deceased, and then by dividing the residuum by three. In such a case, where there is not sufficient property left in the succession to satisfy the legitime of the father, in whole or in part, the donee is required to supply the deficiency out of the things donated, or, in case of their alienation, out of his own property. *Succession of Desina*, 123 La. 470 (49 Sou. 23).

Art. 1506. See Art. 1502, 125 La. 206.

Art. 1507. See Art. 1502, 125 La. 206.

Art. 1509.

When property donated by act *inter vivos* by a father or mother to a person not an heir is sold by the latter, the third possessor, when proceeded against by the forced heirs of the donor for the enforcement of their legitime upon the property itself, can repel the demand by offering to pay the heirs their money. *Stockwell vs. Perrin*, 112 La. 643 (36 Sou. 635).

Refer to Art. 1503.

Art. 1511. See Succession of Jacobs, 104 La. 458.

Art. 1513. See Art. 1497, 126 La. 832.

Art. 1514. See Art. 1497, 126 La. 832.

Art. 1515.

Collation of revenues is due from the time of the death of the deceased only when the suit to compel same has been brought within the year; otherwise, it is due only from judicial demand. The fact that the donations complained of were disguised under the form of sales made no difference, unless thereby the complainant has been kept in ignorance of his right to demand a collation. *Clark vs. Hedden*, 109 La. 148 (33 Sou. 116).

Art. 1516. See Wells vs. Goss, 110 La. 353.

Art. 1517. See Wells vs. Goss, 110 La. 353.

Art. 1519. See Art. 886, 51 La. An. 539; Art. 488, 119 La. 279; *Brewer vs. Y. & M. V. Ry.*, 128 La. 552.

Names cannot change substance. Where the title created by the will is a tenure not recognized by our Code, if the Court were to change it, and convert it into a valid title, it would be making a new will. *Succession of Kernan*, 52 La. An. 48 (26 Sou. 749).

A bequest in a will for the erection of a memorial window to another in a church, left in trust to trustees, who are themselves to fix the amount to be expended—the will naming no amount to be thus disbursed—is not a valid tes-

tamentary disposition. A bequest of the residue of the testator's estate to trustees in trust for such charitable uses and purposes in Ireland as they in their discretion might think proper to apply to it is not valid. *Succession of Mrs. Alice B. McCloskey*, 52 La. An. 1122 (27 Sou. 705).

But, if it be conceded that the clause referring to his natural heirs and hers be a *fidei commissum*, the only consequence would be the words importing the same must be reputed not written. It is only in cases of substitution that the entire disposition of a will is null; in case of a *fidei commissa* pure and simple, the clause alone creating the *fidei commissum* is null, leaving unaffected the validity of the disposing clause or main donation. *Dufour vs. Derescheid*, 110 La. 344 (34 Sou. 469).

Granting, however, that these directions amount to a condition, and that this condition is one impossible if accomplishment because of the incapacity of the university to fulfill it, the bequest would not be on that account the less valid. The case would then fall squarely within the principle of Art. 1519. *Succession of Hutchinson*, 112 La. 700 (36 Sou. 639).

Where a testator leaves three daughters, unmarried, and, after bequeathing a small competence, wills the residue to an asylum, on condition that a comfortable room and support be furnished for his daughters, should misfortune render them homeless, a reasonable construction of the bequest leads to the conclusion that its main object is to make such a provision for the daughters in case they should become destitute. And in such case, the asylum being incapable of receiving them, and the condition imposed being impossible of fulfilment, the bequest fails. *Succession of Thompson*, 123 La. 949 (49 Sou. 651).

Substitutions and *fidei commissa*, being prohibited as a rule of public order, cannot be created or maintained by the conventions of the individuals or by estoppels or pleas of estoppel. *Succession of LeBlanc*, 128 La. 1056 (55 Sou. 672).

Art. 1520. See Art. 1519, 51 La. An. 539, 52 La. An. 50, 110 La. 345, 128 La. 1056.

Where the testatrix directs that certain property be held by her executor during the life of a third person, to whom a portion of the revenue is to be paid, and that it

then be sold, and the proceeds, after the payment of certain particular legacies, paid over to her universal legatee, the whole disposition fails, and effect cannot be given to the universal legacy, for the same reason that it cannot be given to the particular legacies, because they are both within the prohibition of Art. 1520. *Succession of Herber*, 128 La. 112 (54 Sou. 579).

Art. 1521. See Art. 1519, 51 La. An. 539.

Art. 1523. See *Hearsey vs. Craig*, 126 La. 832.

The first being the free gift defined by the lexicographers, the second being a gift burdened with charges imposed by the donor, and the third being a gift the object of which is to recompense for services rendered, in either case the donation must be made by authentic act, and accepted by the donee in precise terms. *Ackerman vs. Larner*, 116 La. 117 (40 Sou. 581).

Refer to Arts. 1536, 1538, 1539, 1540.

Art. 1524.

As the value of the lands donated exceeded by more than one-half that of the charges or services imposed on the donee, the rules applicable to donations *inter vivos* are used. The deed of gift vested a conditional title in the grantee, and his non-performance of the conditions vested a legal right in the grantor, at her option, to declare the conveyance null and void. Plaintiff exercised her right of election by the institution of the present suit. *Baker vs. Baker*, 125 La. 972 (52 Sou. 115).

Refer to Art. 1526.

Art. 1525. See Art. 503, 129 La. 513; *Hearsey vs. Craig*, 126 La. 832.

Art. 1526. See Art. 1524, 125 La. 972; Art. 503, 129 La. 513; *Ackerman vs. Larner*, 116 La. 117; *Hearsey vs. Craig*, 126 La. 833.

While it is true that the rules peculiar to donations *inter vivos* do not apply to the remunerative donations, this is not without exception. For instance, where the value of the object given exceeds by one-half the amount of the charges or the value of the services, it is necessary that the

act of donation should, like gratuitous donations, be passed before a notary and two witnesses. *Pulford, Tutor, vs. Dimmick et al.*, 107 La. 403 (31 Sou. 879).

Refer to Arts. 2655, 2659.

Art. 1527. See *Voincne vs. Town of Marksville*, 124 La. 716; *Baker vs. Baker*, 125 La. 973.

Art. 1529. See **Art. 1467, 105 La. 712.**

Art. 1533. See **Art. 1467, 105 La. 712**; *Hearsey vs. Craig*, 126 La. 838.

Art. 1534. See **Art. 1468, 124 La. 12.**

Art. 1535. See **Art. 1468, 124 La. 12.**

Art. 1536. See **Art. 460, 105 La. 711**; **Art. 1523, 116 La. 116.**

An assignment of an undivided interest in a policy of life insurance by an heir of the beneficiary to a third person without receiving a consideration must be deemed a donation; and, considered as such, to have effect, it should be passed before a notary and two witnesses, as required by law; otherwise, same will not be enforceable. *Mutual Insurance Co. vs. Houchins et al.*, 52 La. An. 1137 (27 Sou. 657).

The indorsement and delivery by the donor of a check payable to order constitutes a valid donation of the funds represented by such check. *Succession of Desina*, 123 La. 469 (49 Sou. 23).

A deed of gift under private signature, attested by two witnesses and acknowledged by the donor before a notary in another State, is not such an authentic act as is required by the law of Louisiana to evidence donations of immovables. *Baker vs. Baker*, 125 La. 969 (52 Sou. 115).

A transfer of property (in this case, a life insurance policy) by the husband to the wife in satisfaction of it is, therefore, not an onerous contract, but a donation; and, as such, is subject to the rules of form prescribed for donations. *Succession of Miller vs. Manhattan Life Ins. Co.*, 110 La. 653 (34 Sou. 723).

Refer to Arts. 1539, 2308, 2446.

Art. 1538. See Art. 1523, 116 La. 116.

There can be no legal manual gift "*causa mortis*" of a movable, whether it be a corporeal or an incorporeal movable. Donations "*causa mortis*" differ from the donations "*mortis causa*"; the former are not authorized in Louisiana by its law. Property can neither be applied nor disposed of gratuitously unless by donations *inter vivos* or *mortis causa*. *Succession of Sinnott vs. Bank et al.*, 105 La. 705 (30 Sou. 233).

Refer to Arts. 1539, 1570.

Art. 1539. See Art. 1538, 105 La. 711; Art. 1523, 116 La. 117; Art. 1536, 123 La. 479.

Where the decedent, an old bachelor of means, caused a certain sum of money to be deposited in a savings bank to the credit of his two dependent sisters, living with him, the delivery to the bank was a delivery to the sisters, and the donation had full effect instantly. *Succession of Zacharie*, 119 La. 150 (43 Sou. 988).

Refer to Arts. 1541, 2447.

Art. 1540. See Art. 1523, 116 La. 116, and Lyons vs. Lawrence, 118 La. 467.

The act of donation had not been accepted by the donee intended in the manner required. The donations produce effect from acceptance in precise terms. The donor, not having been divested of his interest in the succession by an acceptance in due form, was entitled to the appointment. *Estate of Mora, Opposition of Navarro*, 51 La. An. 316 (25 Sou. 123).

Art. 1541. See In re Lahaye, 115 La. 1092; Art. 1539, 119 La. 150.**Art. 1549.**

Even if the legacy had been devised directly to the poor of the City of Carouge, it would come within the letter of the law, for the city could and would take charge of it and administer it for the beneficiaries. *Succession of Meunier*, 52 La. An. 89 (26 Sou. 776).

Art. 1551.

Where the purchase price has been used in the payment of pre-existing mortgages, which were extinguished and canceled on the record, such payment gives no right of subrogation to the purchaser or his assigns, since the price thus used was the money of the vendor. Where the owner sells his homestead, it passes to the purchaser and his assigns burdened with the judicial mortgages inscribed against it. *Abbeville Rice Mill vs. Shambaugh*, 115 La. 1047 (40 Sou. 453).

Art. 1554. See Art. 503, 129 La. 512.**Art. 1559. See Art. 1468, 124 La. 12; Griffith vs. Alcocke, 113 La. 519; Grandchampt vs. Adm. of Succession of Billis, 124 La. 125.**

But is an act of revocation to be viewed as a mere donation? The question is answered in the negative by the decision of this Court. *Grasser vs. Blank*, 110 La. 499 (34 Sou. 648).

The word "conditions," providing for the revocation of donations for non-fulfillment of eventual conditions, is synonymous with the word "charges"; and, when a donation contains charges, it is considered as made under the condition that it may be dissolved or revoked if they are not executed. *Voinche vs. Town of Marksville*, 124 La. 713 (50 Sou. 662).

If the conditions be potestative, a dissolution must be sued for and decreed judicially; otherwise, not. *Baker vs. Baker*, 125 La. 972 (52 Sou. 115).

Art. 1560. See Art. 968, 124 La. 125; Percy vs. Craig, 126 La. 838.**Art. 1561. See Lawson vs. Connolly, 51 La. An. 1762; Art. 966, 124 La. 117.****Art. 1562.**

A notarial act by which a father sells to his daughter certain real estate for \$4,000, \$3,000 cash and the balance represented by two notes of the vendee to her own order, and by her indorsed, and secured by mortgage on the property sold, cannot be set aside by the father on the ground

of ingratitude and cruel treatment to him by his daughter, and that the act evidenced really a donation to her, when the father has received and discounted the note of the vendee with a third person, and the property itself has, anterior to the demand for revocation, passed into the hands of a purchaser in good faith. *Lawson vs. Connolly*, 51 La. An. 1753 (26 Sou. 612).

Art. 1565. See *Baker vs. Baker*, 125 La. 973.

Art. 1568. See *Baker vs. Baker*, 125 La. 973.

Art. 1569.

Where a donation is annulled, the donee has no equitable claim for improvements and betterments when their cost is less than the value of the timber on the premises converted to his own use by the donee. *Baker vs. Baker*, 125 La. 970 (52 Sou. 115).

Art. 1570. See *Succession of Jacobs*, 104 La. 453; **Art. 1538, 105 La. 715.**

In Arts. 1570 and 1571, forbidding *ldei commissa* and substitution, we have statutes against perpetuities. *Female Orphan Society vs. Y. M. C. A.*, 119 La. 284 (44 Sou. 15).

Refer to Art. 1571.

Art. 1571. See Art. 1570, 119 La. 284.

Art. 1573. See Art. 1519, 52 La. An. 1124.

Our law prohibits the custom of willing by testament by the intervention of a commissary or attorney in fact, and declares that the institution of heir and all other testamentary dispositions committed to the choice of a third person are null, even should that choice have been limited to a certain number of persons designated by the testator. *Succession of Mrs. Honoria Burke*, 51 La. An. 543 (25 Sou. 387).

Where a bequest in a will in one view is illegal, in another view lawful, the latter will be adopted and the will sustained.

A legacy to the Commune of Carouge, Canton of Geneva, Switzerland, which is directed to be placed at interest, and with the interest to endow annually two poor girls, and to give a pension to ten old persons of the two

sexes, is held to be a legacy to pious and charitable uses, and sustainable. *Succession of Meunier*, 52 La. An. 80 (26 Sou. 776).

Refer to Art. 1713.

Art. 1574. See Art. 1467, 105 La. 712.

Art. 1576. See Art. 1467, 105 La. 712.

Art. 1578. See Art. 1100, 51 La. An. 798.

Where the testator handed to the notary written memoranda expressive of his wishes, saying "Comme ça, comme ça" ["Like this, like this"], and nothing more, during the entire time of the confection of the instrument, there was no dictation, and the testament is null. *Succession of Theriot*, 114 La. 612 (38 Sou. 471).

By "place" in Art. 1578 is meant "parish." *Oglesby vs. Turner*, 127 La. 1097 (54 Sou. 400).

Where a nuncupative will by public act is not dictated by the testator or written by the notary in the presence of the witnesses required by law, where one of the subscribing witnesses did not understand the language in which the will was written, and where what was done was not done without turning aside to other acts, the will is void. *Richard vs. Richard*, 129 La. 967 (57 Sou. 286).

The express mention which must be made in a nuncupative will by public act of the will being dictated by the testator and written by the notary as dictated in the presence of the witnesses, and of the residence of the witnesses, is not required to be made in any particular part of the will. If it is made in any part of the will the law is complied with. The notarial act is an indivisible whole, and the signatures are attested as a whole. *Ducasse's Heirs vs. Ducasse*, 120 La. 731 (45 Sou. 565).

Refer to Art. 1595.

Art. 1579.

In case a nuncupative testament by public act is held good as one under private signature in other respects, the notary signing the act and the person who signs the name of the testatrix on account of her physical disability are competent witnesses. *Frith, Tutrix, vs. Pearce, Tutor*, 105 La. 186 (29 Sou. 809).

Where the recitals made in the will are of such a character as to leave no doubt in the mind of the Court that the testator did make his will according to law under Art. 1579, the will will be maintained. Such is the case where the notary spelled "Grouzeilles" instead of "Crouzeilles." *Succession of Crouzeilles*, 106 La. 446 (31 Sou. 164).

Refer to Arts. 1581, 1582, 1590.

Art. 1581. See Art. 1579, 105 La. 190.

A nuncupative will by private act is not invalid because written in the presence of five attesting witnesses without formal dictation. "The presentation" of such a will supplies or dispenses with dictation, and it need not be manual, but the acknowledgment of the testator that the paper contains his last will implies the presentation provided by law, even when that acknowledgment is in response to a question. *Succession of Reems*, 115 La. 102 (38 Sou. 930).

Refer to Art. 1582.

Art. 1582. See Succession of Royer, 105 La. 282; Art. 1579, 105 La. 190; Art. 1581, 115 La. 102.

Art. 1589. See Girault vs. Feucht, 117 La. 284.

Art. 1590. See Art. 1579, 105 La. 193.

Art. 1591.

This article was amended by Act 30 of 1908, p. 32, which replaced paragraph No. 1 with the following: **Married women to the wills of their husbands are incapable.**

The executor is a competent witness to the will in which he is named executor. *Davenport vs. Davenport*, 116 La. 1010 (41 Sou. 240).

Under the Civil Code, a boy over the age of sixteen years is capable of being a witness to a will; and, where he actually resides in the parish, is a competent witness to a nuncupative will by public act, although his parents reside in another parish. *Oglesby vs. Turner*, 127 La. 1093 (54 Sou. 400).

Refer to Arts. 1592, 1594.

Art. 1592. See Art. 1591, 116 La. 1010.

Art. 1594. See Art. 1591, 127 La. 1095.

Art. 1595. See Art. 1467, 105 La. 712; Art. 1578, 114 La. 616.

Article 1689 of the Civil Code was not intended to apply to the probating of wills of persons who were domiciled in and died in the State of Louisiana which happened to have been made in a foreign country or a sister State. Such wills must be primarily proved or probated in Louisiana. *Succession of Drysdale*, 121 La. 817 (46 Sou. 873).

Refer to Arts. 1596, 1688, 1689.

Art. 1596. See Art. 1595, 121 La. 817.**Art. 1605. See Succession of Jacobs, 104 La. 453.****Art. 1607.**

While it is true that the forced heir stands in the shoes of the *de cujus*, and that "*Le mort saisit le vif*" is a controlling doctrine, yet, when heirs have gone into possession under a will under an order of the Court made contradictorily with a co-heir, he is concluded so far as relates to possession, and must bring a direct action for the legitimate. *Cox et al. vs. Von Ahlefeldt et al.*, 105 La. 544 (30 Sou. 175).

It is error to tax her upon the usufruct of one-third of the separate estate, for the reason that, after the deceased had disposed of two-thirds thereof in full ownership, the disposable portion was exhausted, so that the legacy was to that extent excessive and subject to reduction. It is well founded, since, under the circumstances, no delivery of such a legacy can even take place. *Succession of Baker*, 129 La. 94 (55 Sou. 714).

Art. 1609. See Art. 940, 115 La. 1028.**Art. 1611. See Art. 940, 115 La. 1028.****Art. 1621. See Art. 112, 52 La. An. 1379.**

Minority is implied when the cause of disinherison set forth in the testament is applicable only to minors. *Stephens vs. Duckett*, 111 La. 979 (36 Sou. 89).

Refer to Arts. 97, 1624.

Art. 1624. See Art. 112, 52 La. An. 1379; Art. 1621, 111 La. 981.

Art. 1626.

The decisions holding that the property of a succession pending administration is owned by the "Succession," mean nothing more than that the property is so held for the purpose of administration. They do not mean that the property is so held in hostility to or exclusion of ownership and legal seisin of the legal heir or of the universal legatee. *Tulane University vs. Board of Assessors*, 115 La. 1026 (40 Sou. 445).

Whilst the legal or instituted heir is called to inheritance immediately after the death of the deceased, the particular legatee is not so called—are intended to guard against the carrying into effect of testamentary dispositions, which may be at variance with the law or public policy. But they do not operate to destroy the effect of a particular legacy otherwise valid, or furnish authority to an executor, whose testator has left no debts, or to one not the executor to procure the sale, by order of the Court, of a thing which the will directs shall be delivered to such legatee. *Brewer vs. Y. & M. V. Ry.*, 128 La. 544 (54 Sou. 987).

Art. 1630.

Such particular legacies are in the hands of the succession representative to be turned over to the legatees, and not being themselves exempt from taxation, are properly assessed to the succession. The universal legatee does not pay the tax, but receives that much less. *Tulane University vs. Board of Assessors*, 115 La. 1025 (40 Sou. 445).

Refer to Art. 1634.

Art. 1634. See Art. 1630, 115 La. 1025.**Art. 1640.**

The same principle set forth in this article is also set forth in Article 2156, *Commercial Company vs. Oil Co., Ltd.*, 104 La. 675 (29 Sou. 265).

Art. 1644.

Persons claiming as testamentary heirs, under a will, which they allege has been lost or destroyed, have no standing in court to vindicate the property claim, in the absence of an averment that the execution of such will has been ordered by a competent court. *Spowl vs. Lockett*, 109 La. 894 (33 Sou. 911).

Art. 1647.

On the trial of such opposition the testimony of the notary and subscribing witnesses is admissible for the purpose of proving that the formalities required by law were not observed. *Succession of Theriot*, 114 La. 612 (38 Sou. 471).

Recitals in such a will (nuncupative will by public act) must be deemed proved until they are disproved. *Succession of Block*, 131 La. — (59 Sou. 29).

Art. 1648.

The Court has held that proof of dictation was immaterial and unnecessary, where it appeared that the will was caused to be written by the testator and drawn up by his direction. *Succession of Reems*, 115 La. 104 (38 Sou. 930).

A will made in Canada by a resident of the State of Louisiana is entitled to probate in the courts of state on the proof that the formalities prescribed by the laws of Canada have been observed in the confection of the instrument. Sheets which are bound together and constitute the will at the testator's death are presumed to have been bound together at the time of the attestation, when the papers are coherent and in their natural order. *Succession of Drysdale*, 124 La. 256 (50 Sou. 30).

Refer to Art. 1649.

Art 1649. See Art. 1648.**Art. 1652.**

Executors and tutors hold estates for minors and give them what is necessary. The minors cannot take it from the executors or tutors. *Succession of Le Blanc*, 128 La. 1060 (55 Sou. 672).

Art. 1653. See Succession of LeBlanc, 128 La. 1060.**Art 1655.**

Depositions as to general resemblance will not suffice, especially where the means of knowledge of the witness is very limited, and the testament is suspicious on its face. *Grandchampt vs. Succession of Adm. of Billis*, 124 La. 117 (49 Sou. 998).

Art. 1659. See Succession of LeBlanc, 128 La. 1060.

Art. 1660.

Where an executor has not the seizin of an estate, his commission should be based on the money and property that actually passed to his hands in the course of the administration. *Succession of Delano*, 125 La. 869 (51 Sou. 1019), and see Art. 1683.

Refer to Art. 1684.

Art. 1661. See Succession of LeBlanc, 128 La. 1060.

Art. 1663. See Succession of LeBlanc, 128 La. 1060.

Art. 1664. See Succession of LeBlanc, 120 La. 1060.

Art. 1665. See Succession of LeBlanc, 128 La. 1060.

Art. 1666. See Succession of LeBlanc, 128 La. 1060.

Art. 1667. See Art. 1150, 119 La. 436.

Art. 1670. See Succession of Hart, 52 La. An. 373.

Art. 1671. See Succession of Filhiol, 119 La. 1002; Succession of Le Blanc, 128 La. 1060; **Art. 1012, 126 La. 9; Art. 940, 115 La. 1029**; *Byrnes vs. Byrnes*, 115 La. 296.

A judgment, which is practically *ex parte*, probating a will, and putting in possession of an estate certain persons named in such will as universal legatees, does not immediately close the succession as against other persons, who claim as heirs at law, and who charge that those put in possession are incapable of taking under the will. And a suit, by such claimants, brought within three months after the probate, to annul the will, and to be decreed owner of the estate, is a matter of probate jurisdiction, cognizable in the court in which the will was ordered to be executed, and by the judgment of which the persons named as universal legatees were put in possession. *Schwan vs. Schwan et al.*, 52 La. An. 1183 (27 Sou. 678).

Refer to Art. 1012.

Art. 1673.

There is no suspensive appeal from a judgment refusing to remove the executor. The action of the Court in

setting aside the sequestration gave the relator no right to a suspensive appeal therefrom. When the demand failed the incidental conservatory order failed also. *Succession of Platz*, 122 La. 15 (47 Sou. 119).

Art. 1674. See Art. 1049, 114 La. 497.

Art. 1680.

The legal representatives of a deceased executor cannot consent to the dismissal of an appeal taken by the executor officially. *Succession of Gallia*, 130 La. — (58 Sou. 691).

Art. 1683. See Art. 1069, 51 La. An. 598.

The right of the last administrator to his commission is a direct liability from the succession to himself; and he cannot be remitted for payment to a settlement between himself and a prior administrator, who had appropriated to himself for commissions the whole amount allowed for commission of a full administration. The amount allowed is to be shared between the different administrators, but not necessarily equally. The executor is entitled to retain an expert in preparing his final account only in exceptional cases; nor is he to be reimbursed from the succession for the premiums paid to a surety company for his bond prior to the act of 1900. *Succession of Kernan*, 105 La. 592 (30 Sou. 239).

The property that is unproductive, not shown to have required the least care or attention from the executors, cannot serve as a basis for commission. *Succession of Pierce*, 119 La. 728 (44 Sou. 446).

The commission is calculated on the value of the property in the inventory administered by the executor. *Barbin vs. Couvillon*, 122 La. 408 (47 Sou. 698).

Refer to Arts. 1660, 1684, 1685, 1965, 2290, 2300.

Art. 1684. See Art. 1683, 105 La. 597; Art. 1660, 125 La. 871.

Art. 1685. See Art. 1683, 105 La. 597.

Art. 1686. See Art. 1481, 123 La. 508.

Art. 1688. See Art. 1595, 121 La. 832.

Where it appears upon the face of the record that a dative testamentary executor has been appointed by the

Clerk of a District Court, sitting for a parish, in which the will of the testator had not been produced, proved, or registered, the appointment will be vacated on appeal. *Succession of Henry*, 113 La. 788 (37 Sou. 756).

Art. 1689. See Art. 1595, 121 La. 817.

Art. 1709. See Art. 886, 51 La. An. 546; see also Art. 936, 105 La. 40.

We think that the question of who should take the bulk of the estates would have to be tested by the question of survivorship, and the fact of survivorship would have to be tested by the presumptions of the Code. In this case the special legacies of both parties would have to be paid, so far, at least, as the legitimate was not concerned, but the order of the succession would not be interfered with. *Quad* the portion of the estate not disposed of, the succession would be intestate succession to be disposed of by the priority of the debts. *Succession of Langles*, 105 La. 63 (29 Sou. 739).

Art. 1710.

Where the donee murdered the donor, and then committed suicide, an action will not lie by the heirs of the donor against the heirs of the donee to revoke or dissolve the donation because of ingratitude. Where A donated certain lands to B, *propter nuptias*, and, after the marriage, B, the wife, donated the same property to A, the husband: *Held*, that the land so retroceded did not fall into community. *Grandchampt vs. Adm. of Succession of Billis*, 124 La. 117 (49 Sou. 998).

Art. 1712. See Succession of Stewart, 51 La. An. 1561;

Art. 1502, 109 La. 42.

Under a will giving an annuity to a widow and her daughters to be diminished each year until it is reduced to \$600, "at which it is to remain until the death of the widow or of the last then surviving one of the daughters," the payments do not cease on the death of the widow before that of the daughters, but continue until the death of the daughter last surviving. The objection that this will has the effect of perpetuating the succession because of one of the persons having a life expectancy of twenty-five years and another of thirty-five years, is not one to be raised by the executor,

but by a person having an interest. *Succession of Pugh*, 129 La. 416 (56 Sou. 352).

Refer to Arts. 1713, 1714, 1715.

Art. 1713. See Succession of Stewart, 51 La. An. 1561;

Art. 1573, 52 La. An. 85; Art. 1502, 109 La. 42;

Art. 1712, 129 La. 416.

The testator provided as follows: "Should my wife die, I want her portion to go to my daughter. Should my daughter die, I want her portion to go to my wife." If by this he meant that, in case one of his legatees died before he did, the other should take the entire estate, the will is irreproachable. If, on the contrary, he meant at the death of the legatee first dying the other should take the estate, the will contains a prohibitive substitution and is null. The scale hanging between these two interpretations, it is made to preponderate in favor of the validity of the will. *Succession of May*, 109 La. 994 (34 Sou. 52).

Art. 1714. See Art. 1712, 129 La. 416.

Art. 1715. See Art. 1712, 129 La. 416.

A will contained the following disposition: "I leave and bequeath unto Alexander C. Hutchinson, my beloved husband, all the property I possess, real and personal, movable and immovable." Held, that the will contained a universal legacy, and that the legatee took all the property owned by the testatrix at the date of her death. *Thomas vs. Blair*, 111 La. 678 (35 Sou. 811).

Refer to Arts. 1720, 1722.

Art. 1720.

Articles 1720, 1721 and 1722 do not apply to general legacies, but only to particular legacies. *Thomas vs. Blair*, 111 La. 681 (35 Sou. 811).

Refer to Arts. 1721, 1722.

Art. 1721. See Art. 1720.

Art. 1722. See Art. 1715; Art. 1720, 111 La. 681.

Art. 1723. See Art. 1502, 109 La. 41.

Art. 1724.

The act of a widow in executing, without consideration, an instrument transferring to her children her undivided half interest in the community property, though an act of partition, is a donation; and is subject to the formalities and conditions of donations *inter vivos*. *Rocques vs. Freeman*, 125 La. 61 (51 Sou. 68).

Refer to Art. 1726.

Art. 1725.

Where a mother divided all her estate among three daughters by separate acts of sale reciting the receipt of the price, the transaction will be considered as a partition binding on the donees until rescinded in a direct action on allegation and proof that the advantages secured to one or more of the co-heirs exceeded the disposable portion. *Spann vs. Hellen*, 114 La. 336 (38 Sou. 248).

Art. 1726. See Art. 1724, 125 La. 61.

Art. 1730. See Art. 1725, 114 La. 340.

Art. 1733. See Art. 1725, 114 La. 340.

Art. 1735. See Succession of Baker, 129 La. 80.

Art. 1745.

The heirs are not estopped, for they have a special right, and they can attack the deed by parol testimony to the extent that their father was without right to give to his wife. Moreover, the declaration made by the husband with a view of favoring the wife constituted a donation in disguise. In attempting to take the property out of the community they violated a prohibitory statute. They resorted to a disguise which confers no title. *Westmore vs. Harz*, 111 La. 309 (35 Sou. 578).

Art. 1746. See Art. 1504, 121 La. 348.

They draw a distinction between acts of mortgage executed by the wife to secure the debt of her husband and the acts of sale, which the wife may have made for the payment of his debts. (Arts. 122, 129, 130, 1746, 1782, 1786, 1798, 1845, 2390, 2397.) *Colgin vs. Courrege*, 106 La. 689 (31 Sou. 144).

A donation made specially and separately to the wife does not fall into the community. The provisions of Art. 2402 of the Civil Code do not apply to such a case. The legal presumptions do not extend from special cases provided for to others not enumerated. The property in this case was not purchased, nor was the donation made jointly to the husband and wife. *Hurst vs. W. B. Thompson & Co.*, 118 La. 58 (42 Sou. 645).

If defendant's marriage with the testator was valid, it removed entirely this qualification, which had resulted from the concubinage. (C. C. 1481, 1746.) *Ducasse's Heirs vs. Ducasse*, 120 La. 738 (45 Sou. 565).

Refer to Arts. 1782, 1786, 1798, 1845, 2390, 2397, 2402.

Art. 1747.

However, it has been held that the nullity of a donation by a minor is not absolute, but relative, intended for the minor's protection; and, in the absence of fraud, cannot be urged by subsequent creditors. *Succession of Desina*, 123 La. 481 (49 Sou. 23).

Art. 1748. See Art. 1747, 123 La. 480.

Art. 1749.

Article 1749 must be construed with Art. 3478; and, so construed, must be held to mean that interspousal donations shall always be revocable save as against third possessors acquiring property by the prescription of ten years. *Leverett vs. Loeb*, 117 La. 310 (41 Sou. 584).

Refer to Art. 3478.

Art. 1751.

If there was anything about it against public policy and good morals, the parties would have to be left where they placed themselves by their own acts; they would not be in a position to avail themselves of the machinery of the court to set aside what has been completely done in contravention of Art. 1751. *Rudolf vs. Costa*, 119 La. 790 (44 Sou. 477).

Art. 1752.

Property was bought by the community, the declarations in the deeds of purchase to the contrary notwithstanding. The plaintiffs, son and daughter by the first marriage,

were entitled to the legitime. In the litigation instituted to recover their legitime, and whatever further right they may have, it became evident that the declarations in the deed that the wife had bought the property with her paraphernal funds were not true. The Court ordered the property be returned to the mass in order that the heirs may recover their legitime and whatever may remain of the community after the legitime has been paid. As relates to the community, the right is not limited to the legitime. *Westmore vs. Harz*, 111 La. 305 (35 Sou. 578).

Whilst the husband is estopped to deny the truth of the recitals contained in a conveyance of property to the wife, to which he was a party, his forced heirs, alleging that the conveyance was made to the prejudice of their legitime, are not so estopped; and, where it is shown by them that property acquired in the name of the wife was paid for with the separate funds of the husband, they being his children by a previous marriage, the investiture of the title in the wife will be regarded as in the nature of a donation, and reduced to a value not exceeding one-third of the donor's estate. *Succession of Graf*, 125 La. 197 (51 Sou. 115).

Art. 1753. See Art. 343, 129 La. 553.

Donations made by one of the spouses to the other before marriage fall within Art. 1753, according to which the spouse who married the second time forfeits to the children of the first marriage all the property acquired by donation from the deceased spouse. *Didlake vs. Cappel*, 116 La. 844 (41 Sou. 112).

Art. 1754. See Art. 1481, 129 La. 238.

Donations by a man of money for the purchase of land in the name of his concubine, for her benefit and the benefit of his bastard children, are donations of personal property, and are not void as to his forced heirs. Article 1754 of the Civil Code, providing that husbands and wives cannot give to each other indirectly beyond what is permitted by law, and all donations disguised shall be void, applies only to donations between husband and wife, and disguised donations between others are not void as to forced heirs for being disguised. *Malbrough vs. Rountree*, 128 La. 39 (54 Sou. 468).

Art. 1755. See *Thompson vs. Banks*, 110 La. 30.

Art. 1756.

The legal acceptation of the word "debt" is not limited to the idea of a determinate sum of money due on an express agreement. The term applies to obligations imposed by law, or quasi-contracts, as well as to obligations arising from contracts, express or implied. *Morgan's L. & T. R. & S. S. Co. vs. Stewart*, 119 La. 392 (44 Sou. 138).

Refer to Arts. 1757, 1758, 1759, 2133, 2308, 2446.

Art. 1757. See **Art. 1756, 119 La. 407**; *State ex rel. Las-serre vs. Michel et al.*, 105 La. 744.

Where a license levied under a parish ordinance, which was passed without the observance of some legal requirement, has been voluntarily paid, it can be recovered back on the ground of error only under exceptional circumstances. *Fuselier vs. St. Landry Parish*, 107 La. 221 (31 Sou. 678).

This obligation of the husband to make provision for the wife for the time after his death is, besides, subject to the uncertain condition of the predecease of the husband, and for this additional reason is not such a debt as may serve as a legitimate cause within the meaning of Art. 2446 for a *dation en paiement* by husband to wife. *Succession of Miller vs. Manhattan Life Ins. Co.*, 110 La. 653 (34 Sou. 723).

Art. 1758. See **Art. 1757, 107 La. 226**.

Art. 1759. See **Art. 1757, 107 La. 226**.

Art. 1760.

The appellees were not aware, when they leased "Zeringue Landing, under Nine Mile Point," from Pablo Sala, that their lessor had parted with the ownership of a large portion of that part of the river front of the Zeringue Plantation which was suitable as a safe harbor and landing, and they were in no wise to blame for their ignorance. The appellees were, therefore, entitled to a reduction in the rent. *Fabrigas vs. Wood*, 105 La. 2 (29 Sou. 367).

Refer to Arts. 2724, 2696, 2701.

Art. 1761.

A so-called mineral lease for ten years based on a royalty, in which the lessee does not obligate himself to develop the premises for oil and gas, and in which the lessee reserves the right at any time to terminate the lease after finding oil or gas in paying quantities, is void, as to the lessor, for the want of consideration. *Goodson vs. Vivian Oil Co.*, 129 La. 956 (57 Sou. 281).

Refer to Arts. 1763, 1768.

Art. 1762. See *Kent vs. Davis Bros. Lbr. Co.*, 122 La. 1058.

A contract must not be confounded with the instrument in writing by which it is witnessed, and so "rights" must not be confounded with the writings which evidence them. The certificates involved in this case are mere "admissions" of the bank that the party named is interested in the bank to the extent named. The rights of the holders of the shares in the bank are back of and beyond the certificates. The certificates could be lost or destroyed and the rights of the owners would remain. *Succession of Sinnott vs. Bank et al.*, 105 La. 717 (30 Sou. 233).

The citation in a case must not be confounded with the Sheriff's return upon the citation, which recites his own actions in the matter of the service thereof. The citation may be good, though the return, for some reason, be irregular; while the return may be perfect in its recital, yet the citation be null. *Baham vs. Stewart Bros. & Co.*, 109 La. 999 (34 Sou. 54).

But, even if the deed in question had been a sale, and had transferred the title from Mrs. Voiers to the defendants, the retrocession by them to her transferred the title to her, although the latter deed was never recorded. Registry was not necessary as between parties. *Voiers vs. Atkins Bros.*, 113 La. 319 (36 Sou. 974).

Refer to Art. 1911.

Art. 1763.

The obligation to fulfill a marriage engagement is personal, and the obligation to respond in damages, in the event of its non-fulfillment, is incidental thereto; from which it follows that, if the obligor dies before fulfilling the engage-

ment, and without being put in default, the right of action to recover damages for non-fulfillment perishes with him, and cannot be exercised against his heirs. *Aliter*, where he has been put in default. *Johnson vs. Levy*, 118 La. 447 (43 Sou. 46).

Refer to Arts. 1911, 1933, 1934, 1996.

Art. 1764. See Art. 2038, 127 La. 74; Art. 1885.

While the validity of a sale or dation does not depend on a price being fixed with certainty in the act, it does depend on a certain price having been agreed upon by the parties, or left to the arbitration of a third person, who fixes it. *Pulford, Tutor, vs. Dimmick et al.*, 107 La. 403 (81 Sou. 879).

Where a plantation is sold, together with the appurtenances, and in the act it is stated that the appurtenances included in the sale are mentioned in a list annexed to the act, and this list does not include the fencing, the fencing passes nevertheless with the land. *Bagley vs. Rose Hill Sugar Co.*, 111 La. 250 (35 Sou. 539).

A contract purporting to be a lease of mineral rights, whereby, in the event of the discovery of oil and gas, the gross yield is to be shared, in certain proportions, by the contracting parties, is not void upon its face for want of mutuality, or as containing a potestative condition, where the tract contains forty acres and \$50 quarterly in advance is paid as rental and the contract may be canceled by one party upon the payment of \$100. *Houssiere-Latreille Oil Co. vs. Jennings-Heywood Oil Syndicate*, 115 La. 108 (38 Sou. 932).

An agreement whereby one of the parties binds himself to make to the other a bond for title, but the language of which imposes no obligations upon the other party, is not bilateral. *Kaplan vs. Whitworth*, 116 La. 337 (40 Sou. 723).

The stipulation in defendant's policy as to the assured becoming a co-insurer with the insurance company in a certain contingency to the extent and under the conditions stated is not against public policy. Liberty of contract is the rule, and limitations and restrictions the exception. *Simon vs. Queen Ins. Co.*, 120 La. 478 (45 Sou. 396).

The act, whether a contract of sale or a promise of sale, evidences a contract of some kind, creating rights and

obligations on both parties which neither could ignore. This was an option on real estate for thirty days, the property to be taken if the title was found good. *Whited & Wheless vs. Calhoun*, 122 La. 100 (47 Sou. 415).

Stipulations relating to the erection of the mill and the making of payments thereon paydays to be fixed are, *quoad* the sale of the timber, "accidental"; being neither of the essence of the contract nor necessarily implied from its nature, but depending solely on the will of the parties. *Moore vs. O'Bannon & Julian*, 126 La. 167 (52 Sou. 253).

Refer to Arts. 1802, 1885, 1900, 1961, 2013, 2028, 2034, 2085, 2041, 2439, 2474, 2655, 2659.

Art. 1765.

A contract to sell standing timber, wherein the party of one part says, in effect, to the other, "If you assent to this contract at once, and bind yourself to return the timber for assessment, and pay taxes, and cut and remove the timber within ten years, or within twenty years if you wish to pay the price herein stipulated for the extension of time, and pay fifty cents per thousand feet monthly for such timber as the same is cut and removed, or pay ten cents per acre per year on the land for the last ten years of the term of contract, then I sell and transfer the timber to you for these considerations; provided, that, should a standard-gauge railway not be built to X within four and two-thirds years, this engagement is to be null," is not, if converted by the assent of the other party into a contract, void for want of consideration or want of mutuality. *Riley vs. Union Saw Mill Co.*, 122 La. 864 (48 Sou. 304).

Refer to Art. 1768.

Art. 1766.

There is nothing in the situation of the parties or in the terms of the offer made on behalf of the plaintiffs to justify the assumption that the defendant was to be allowed two years within which to signify its acceptance of that offer; and, if it had allowed much less time to elapse before such acceptance, the plaintiffs would not have been bound thereby, but would have had the right to withdraw the offer. (Arts. 1766, 1800, 1801, 1802, 1804.) *Nickerson vs. Allen Bros. & Wadley*, 110 La. 197 (34 Sou. 411).

The alleged vendee did not sign it, nor pretend to assume any of the obligations of a vendee under it for more than two years after the offer was made. He was not at liberty during all that time to keep the matter open, holding the party making the offer bound, but leaving himself free to take such course as his own will and interests might dictate. Until accepted, there was no mutuality of obligations under the offer. *Union Saw Mill Co. vs. Lake Lbr. Co.*, 120 La. 106 (44 Sou. 1000).

Refer to Arts. 1800, 1801, 1802, 1804, 1805, 1806.

Art. 1768. See Art. 1761, 129 La. 958; Art. 1765, 122 La. 878.

An act by which landowners granted a right of way over their land for the construction of a railroad, consideration one dollar and advantages, benefits and conveniences and the enhancement in value of their adjacent property, evidences, not a donation pure and simple, but a commutative contract. *Kirk et al. vs. K. C. S. & G. Ry.*, 51 La. An. 667 (25 Sou. 457).

Refer to Art. 1777.

Art. 1776.

An agreement stipulating a sale of "all oranges my trees may produce in the years 1899 and 1900" was held not to be an aleatory contract. The sale was of the hope of the crops, and not of the crops themselves; and the purchaser cannot recover back the part of the price paid, and must pay the part unpaid. *Losecco vs. Gregory*, 108 La. 648 (32 Sou. 985).

A conveyance of property where the grantor reserves enough for his support, the consideration being the obligation to provide the grantee a home during his life, and to bury him when dead, is an aleatory contract, which, save under some exceptional circumstances, is not open to attack for lesion. *Thielman vs. Gahlman*, 119 La. 350 (42 Sou. 123).

Refer to Arts. 1777, 2450, 2451, 2474.

Art. 1777. See Art. 1768, 51 La. An. 676; Art. 1776, 119 La. 350.

In a suit brought upon an assignment of a right of action evidenced by a writing in which the assignment is

declared to have been made for value received, defendant cannot urge, upon an exception of no cause of action, that the instrument should have specifically set forth what the actual consideration was, and set forth all the details of the transaction. It is *prima facie* valid. *Viguerie vs. Hall et al.*, 107 La. 767 (31 Sou. 1019).

Art. 1779.

If the price is left to be determined by experts to be named thereafter by the parties, the contract is null, since either of the parties can nullify it by refusing to appoint the experts. *Louis Werner Saw Mill Co. vs. Oshee*, 111 La. 817 (35 Sou. 919).

Refer to Arts. 2439, 2465.

Art. 1780.

Implied contracts are recognized and enforced in this State. Obligations created by law are enforceable by those in whose favor they are created as fully and completely as obligations resulting from contracts. *Morgan's L. & T. R. & S. S. Co. vs. Stewart*, 119 La. 407 (44 Sou. 138).

Refer to Arts. 1816, 1818.

Art. 1782. See *Reinerth & Husband vs. Rhody*, 52 La. An. 1034; **Art. 166, 52 La. An. 679; Art. 1746, 106 La. 689.**

Refer to Art. 1792.

Art. 1785. See **Art. 1295, 118 La. 303.**

Art. 1786. See **Art. 1746, 106 La. 689.**

Art. 1788. See **Art. 363, 112 La. 715; Art. 402, 116 La. 479.**

The idea of the law is to punish the heirs for not having caused the insane person to be interdicted. Testaments, after thirty days, may be attacked for insanity, but never contracts. *Ducasse's Heirs vs. Ducasse*, 120 La. 739 (45 Sou. 565).

Had judicial proceedings for interdiction been in fact taken out, the legal effect attached to them by reason of their having been resorted to would, under the paragraph of Art. 1788, have ceased on their abandonment. As it

was, Heard died without further action being taken against him, and the first attack made on the sale was through the present suit more than a month after his death. It was then too late. *Heard vs. Blanks*, 125 La. 116 (51 Sou. 87).

Art. 1790. See Art. 1146, 114 La. 211; Art. 337, 125 La. 710.

A wife, donee of her husband's creditor, may, by the effects of the donation, become the creditor of her husband. The wife had no mortgage, and could have no preference over her husband's creditors. The sale to her in satisfaction of her claim as a creditor was not void, but voidable. *Petetin vs. His Creditors*, 51 La. An. 1660 (26 Sou. 471).

A married woman cannot bind herself as surety for her husband on an appeal bond. (Arts. 1790, 2398.) *Succession of Maloney*, 124 La. 672 (50 Sou. 647).

Refer to Arts. 1968, 1977, 1978, 1980, 1989, 1994.

Art. 1791.

The fact that the vendor of certain property may be a corporation which is irregularly or illegally organized does not have the effect of causing the property which has been sold to it and paid for to continue to be the property of the vendor. *Goodwin vs. Bodcaw Lbr. Co.*, 109 La. 1050 (34 Sou. 74).

Art. 1792. See Art. 1782, 118 La. 303.

The railway company cannot claim the tax and repudiate one of the stipulations upon which the grant was made to it. If it repudiate the transaction at all, it must repudiate it altogether. If it sets up the defense of *ultra vires*, it must restore what it has received of the grant made. Like an infant or married woman, the corporation cannot repudiate and enforce the contract at the same time. *Atkins et al. vs. Railway Co.*, 106 La. 577 (35 Sou. 166).

Refer to Art. 1793.

Art. 1793. See Art. 1792, 106 La. 577.

At the dissolution of the marriage by the death of the wife, the husband, without having been qualified to represent the succession, cannot continue the suit instituted by her by asking to be made a party. It was also necessary for him to qualify as tutor of his minor son, who was a

member of the partnership. Plaintiffs have a right to the return of their property or to a reimbursement therefor. *M. M. Sanders & Son vs. Schilling*, 123 La. 1009 (49 Sou. 689).

Art. 1797.

Action without words is presumptive evidence of the acceptance of a proposition when taken under circumstances that imply such acceptance; and a timely suit, brought on the contract alleged to have resulted from a proposition and its acceptance, may in itself be an acceptance of the proposition. *Shreveport Traction Co. vs. Mulhaupt*, 122 La. 667 (48 Sou. 144).

Refer to Arts. 1798, 1802, 1811, 1816, 1818.

Art. 1798. See Art. 166, 52 La. An. 631; Art. 1746, 106 La. 689; Art. 1797, 122 La. 675.

The promise to sell was made on condition that the sale would be completed if the property was unencumbered and the title good. The matter of incumbrance was left to attorneys named. The attorneys did not approve the title. The promisor cannot be held bound to complete the deed. *Flournoy vs. Miller*, 114 La. 1028 (38 Sou. 818).

When an individual applies for shares in a company, there being no obligation to let him have them, there must be a response of the promoters; otherwise, there is no contract. *Feitel vs. Dreyfus*, 117 La. 757 (42 Sou. 259).

Art. 1800. See Art. 1766, 110 La. 197, and 120 La. 115.

Where the president of a bank, having information in regard to its real condition not possessed by a stockholder, obtains from such stockholder an offer to sell his stock at a certain price, upon the representation that the president desires to add to it stock owned by him and sell the whole (including all the stock owned by him) together and at the same price; and it also appears that the president never agreed and never intended to sell his own stock at such price, and sold part, but not all, of it, together with stock obtained from, or contributed by, other holders, at a different price and on different terms from those contemplated by the offer; and it further appears that the stockholder, after such sale by the president, but within the time limit granted to him, withdrew his offer, there having been no

acceptance in the meanwhile, no action will lie for specific performance of the offer to sell or for damages for the failure to make it good. *Blanks vs. Sutcliffe*, 122 La. 448 (47 Sou. 765).

Refer to Arts. 1801, 1802, 1804, 1809, 1893, 1896, 1897.

Art. 1801. See Art. 1766, 110 La. 197; Art. 1800, 122 La. 448; Art. 1766, 120 La. 115.

Negotiations looking to the creation of a contract of promise of sale of immovable property contemplates a contract to be evidenced by writing. Until there be such, either party to the negotiation is at liberty to withdraw. Parol evidence is admissible to prove that, on defendant verbally accepting the proposition made to him by the plaintiff to sell him his interest in certain real estate, the plaintiff at once verbally withdrew his proposition. *Levy vs. Levy*, 114 La. 239 (38 Sou. 155).

Where an obligation purports to be a sale of standing timber and to impose obligations, to be executed in the future, upon the person named as vendee, but such person does not sign the instrument, the circumstances do not indicate the person signing the instrument as vendor had any other intention than that expressed in the instrument. There is no contract, and no time other than is absolutely necessary is allowed for the assent of the vendee; and the signer, upon being notified several years afterward of such assent, has a right to change his intention and withdraw the offer. *Riley vs. Union Saw Mill Co.*, 122 La. 864 (48 Sou. 304).

Where, after a person had made a written offer, he received no actual notice of an acceptance until after he had made a contract with another, the acceptance came too late to bind him, he having already signified his change of intention under Art. 1801. *Union Saw Mill Co. vs. Mitchell*, 122 La. 900 (48 Sou. 317).

Plaintiff, claiming that he was induced to build a planning mill at Gibsland, La., through the representation of defendant that he would donate two acres of land for that purpose, sues the defendant for damages for failure to do so. *Held*, the claim is neither just nor well founded. Defendant, to the knowledge of the plaintiff, was acting in the

matter as an intermediary assisting plaintiff in obtaining the land, and the situation, to his knowledge, was such as to place it out of defendant's power to make title to him when asked to do so. *Lard vs. Colbert*, 120 La. 934 (45 Sou. 946).

Refer to Arts. 1802, 1809, 2275, 2429, 2440, 2468.

Art. 1802. See Art. 1816, 106 La. 432; Art. 1766, 110 La. 197, and 120 La. 115; Art. 1801, 114 La. 245, and 120 La. 115; Art. 1800, 122 La. 448; Art. 1764, 122 La. 101; Art. 1797, 122 La. 765.

The sending forward of the power of attorney was not the initial step in the matter of agency. It was an acceptance, in fact, of plaintiff's offer to take the agency. If an acceptance were necessary, it was accepted by letter and by action within the time that the situation of the parties and the nature of the contract showed it was the intention of the defendant to allow. *Luckett Land & Imp. Co. vs. Brown*, 118 La. 944 (43 Sou. 628).

Written offers to sell timber by the owners executed out of the presence of the vendees, or of any person having authority to accept for them, were intended to be submitted to the vendees as propositions of contract for their acceptance; and, no time being fixed for the acceptance, no more time was intended to be allowed to the vendees than would be required for submission to them for acceptance or rejection; and they could not hold the offers for months for purposes of speculation before accepting or rejecting. *Union Saw Mill Co. vs. Mitchell*, 122 La. 900 (48 Sou. 317).

Refer to Arts. 2988, 2989, 3016, 3027.

Art. 1803.

The things sold were certain. The price agreed to be paid was certain. The consent of all parties was given to the agreement. D was bound absolutely as purchaser, and cannot recede from the agreement by invoking that obligations are subject to a potestative condition. There was indefiniteness in some of its accidental stipulations, but they were susceptible of being made definite by timely action. *Kent vs. Davis Bros. Lbr. Co.*, 122 La. 1047 (48 Sou. 451).

Refer to Art. 1886..

Art. 1804. See Art. 1766, 110 La. 197, and 120 La. 115; Art. 1800, 122 La. 448.

Under the express provisions of Art. 1804, an acceptance of a proposal to a contract need not be made by the same act as the proposal. *Union Saw Mill Co. vs. Mitchell*, 122 La. 900 (48 Sou. 317).

Art. 1805. See Art. 1766, 120 La. 115.

Plaintiff, under an allegation that defendant had offered to pay his debt, but without interest, cannot, over objection, introduce evidence to prove an unconditional promise to pay the entire debt with interest, particularly when he himself testified that she had "offered to pay the account in full if he would take off the interest." An acceptance of an offer must conform to its conditions. *Bartin, Davie & Co. vs. Carville*, 110 La. 862 (34 Sou. 807).

When an individual applies for shares in a company, there being no obligation to let him have any, there must be a response of the promoters; otherwise, there is no contract. *Feitel vs. Dreyfuss*, 117 La. 757 (42 Sou. 259).

Art. 1806. See Art. 1766, 120 La. 115.**Art. 1809. See Art. 1800, 122 La. 455; Art. 1801, 122 La. 880.****Art. 1810. See Joffrion vs. Gumbel, 123 La. 407.**

Where a person, after signing a proposal, died before acceptance, there was no contract under Art. 1810. His representatives are not bound. *Union Saw Mill Co. vs. Mitchell*, 122 La. 900 (48 Sou. 317).

Art. 1811. See Art. 1797, 122 La. 675.

If one lends his name as a partner or suffers his name to be used in the business, he is responsible to third persons as a partner; for he may induce third persons to give credit to the concern which it otherwise would not enjoy. *Johnson vs. Marx Levy & Bro.*, 109 La. 1036 (36 Sou. 68).

Until this payment of \$100 was made, the instrument remained an offer by the plaintiff to sell the timber therein referred to on the terms therein contained; the offer being left open to the Davises for acceptance for sixty days, and their acceptance of the offer to be evidenced by the pay-

ment by them of \$100 to Kent. The one dollar consideration was inserted by the Davises in the belief that a present fixed consideration was necessary. *Kent vs. Davis Bros. Lbr. Co.*, 122 La. 1058 (48 Sou. 451).

If the contract witnessed by the bond could be dissociated from that witnessed by the main contract, and be regarded as merely an offer on the part of the G. and A. to hold plaintiff harmless if plaintiff would employ L as its selling agent, it was nevertheless an offer which was open to acceptance. *Edward B. Bruce & Co. vs. Lambour*, 123 La. 980 (49 Sou. 659).

Refer to Arts. 1816, 1817, 1818.

Art. 1814.

A clause in the contract that the city and parish would reduce the tolls yearly to the extent of one-tenth does not confer upon the general public a vested right to insist that such reduction should be made. The clause evidences a reserved right by the city and parish to reduce the tolls, and not a self-assumed obligation as a stipulation *pour autrui* in favor of the public. So far as the public was concerned, it was expressive of mere intent. *Oliff et al. vs. City of Shreveport et al.*, 52 La. An. 1204 (27 Sou. 688).

A corporation not created for and to be operated for the public use has the right, when some of its stockholders desire that it should become such and some do not, to sell a portion of the property to those particular stockholders who wish to make a public corporation out of it to carry out their wishes. There was no condition in this case attached to the purchase that the property should be made use of in that way. The intentions of the purchaser could (without the possibility of objections from the vendor) be altered at any time. *Goodwin vs. Bodcaw Lbr. Co.*, 109 La. 1063 (34 Sou. 74).

A mere expression on the part of a deceased person of her intention to provide for a friend in her will does not form the basis of a contract; and it is not a will. *Caldwell vs. Turner*, 129 La. 20 (55 Sou. 695).

Art. 1815.

The alleged extension of time, carrying with it their release from all liability, was a mere indulgence to the maker of the note. Not having estopped himself by this in-

dulgence, plaintiff was in a position to turn the notes over to the defendants on payments made by them, with full liberty of action on their part against the principal. *John M. Parker & Co. vs. Guillot*, 118 La. 223 (42 Sou. 782).

Refer to Arts. 3049, 3050.

Art. 1816. See Art. 1811, 109 La. 1048; Art. 1780, 119 La. 401; Art. 1727, 122 La. 675.

Notice of acceptance of guaranty may be waived by the form of the guaranty, or it may be implied by the terms of the instrument. The waiver of acceptance finds support in the facts and circumstances of the case. Willingness to accept the guaranty and the acceptance itself was made evident on the part of the plaintiff by complying with defendant's proposal in postponing payments of overdrafts at the time due, and paying others covered by the instrument of guaranty. *Bank vs. Lemarie*, 106 La. 429 (31 Sou. 138).

Refer to Art. 1802.

Art. 1817. See Art. 1811, 109 La. 1048.

If an insurance company knows at the time it issues a life policy that the answer of the insured that he had not previously applied to another company and been declined, was not true, and still saw fit to favorably consider the application, it cannot afterwards deny liability on the policy. *Bank vs. Life Ins. Co.*, 52 La. An. 37 (26 Sou. 800).

Art. 1818. See Art. 1780, 119 La. 401; Art. 1797, 122 La. 675; Art. 1811, 123 La. 980.

Art. 1819.

A contract made between a debtor and his creditor, from which results a preference to the latter over other creditors, and the creditor so favored knew of the insolvency or embarrassed condition of the debtor, will be set aside as fraudulent. *Johnson vs. Marx Levy & Bros.*, 109 La. 1037 (34 Sou. 68).

Where the trees sold could not be delivered because of adverse claims of possession and ownership, and the purchaser sued the corporation for damages for non-performance: *Held*, that the vendor cannot escape liability on the plea that the sale was null under Article 2452 "as the sale of a thing belonging to another person"; such nullity being

relative and in the sole interest of the *bona fide* purchaser, who, under the very terms of the article, may sue for damages. *Jefferson Saw Mill Co. vs. Iowa & La. Land Co.*, 122 La. 983 (48 Sou. 428).

Refer to Arts. 1977, 1982, 2452.

Art. 1821.

One who holds lands under a testamentary inheritance is bound by the estoppel that would stop the *de oujus* himself, and there is no error of the fact that can be pleaded. *Schwenck vs. Schwenck*, 52 La. 240 (26 Sou. 859).

The tract of land contained 250 acres. She owed T nothing on account of diminution of quantity. She did not know this when she deeded him the other fifty acres to make up the supposed deficiency. T had insisted to her it did, and had backed his insistence by suit. She settled this suit by conveying fifty acres to him. This is an error of fact, and bore upon the motive and principle cause for making the contract. (Arts. 1821, 1823, 1824, 1825, 1826). *Calhoun vs. Teal*, 106 La. 49 (30 Sou. 288).

Refer to Arts. 1823, 1824, 1825, 1826.

Art. 1823. See Art. 1821, 106 La. 49.

Art. 1824. See Art. 1821, 106 La. 49.

The law will not maintain a contract, the consent to which of one of the parties is result of error as to substance of the contract, the error being caused by false representations of the other party, or where the error, if not caused by him directly, has been participated in and made effective by him. *Schmidtz vs. Peterson*, 113 La. 134 (36 Sou. 915).

Refer to Art. 1847.

Art. 1825. See Art. 1821, 106 La. 49.

Art. 1826. See Art. 1821, 106 La. 49.

Art. 1837.

The personal grounds urged as precluding the promisee from selling the land are not sustained by the facts, and are not supported by the terms of the Code; the alleged special skill expected by the plaintiff finds no support. The contemplated partnership never had any right to any amount paid by defendant on the written agreement referred to as

the "Toomer contract." *Sheridan vs. Reese*, 122 La. 1027 (48 Sou. 443).

Art. 1838.

The term "provisional curator" as fitly applies as any other; the powers of the person rather than his title being the matter requiring consideration. *State vs. King*, 113 La. 905 (37 Sou. 871).

Art. 1841.

The stability of title to property requires that an act shall remain unchanged unless it be evidenced that downright fraud or error has been committed. *Franklin vs. Sewall*, 110 La. 293 (34 Sou. 448).

Art. 1845. See Art. 1746, 106 La. 689.

Art. 1846. See Leury vs. Mayer, 122 La. 487.

Where the husband joins with the wife in the sale of real estate acquired in her name, he will not be heard to assert that it is not her separate property in an action brought by him to recover such property, from innocent purchasers who have paid the price, upon the ground that it belonged to the community, and that he allowed his wife to dispose of it in ignorance of his legal rights. *Kenner vs. Godchaux Co., Ltd.*, 52 La. An. 965 (27 Sou. 542).

Ignorance of the law cannot be alleged as a means of requiring property; hence, "the error of law under which a possessor may be as to the validity of his title shall not give the right to prescribe under it." One who acts in ignorance of his rights is not estopped to claim property, which belongs to him, by acting as an expert or an appraiser in a partition proceeding in which such property is divided among others. *Wells vs. Blackman*, 121 La. 395 (46 Sou. 437).

On judgment for plaintiff, defendant did not, by paying the costs, acquiesce in the judgment, within Code of Practice Article 567. *Simms vs. Jeter*, 129 La. 262 (55 Sou. 877).

Art. 1847. See Art. 1824, 113 La. 134.

In the matter of contracts fraud is material only in so far as it is a cause of error vitiating consent, and, as a consequence, vitiating the contract. For the purposes of the action for diminution of price because of partial evic-

tion, the allegation of fraud was unnecessary, since the diminution of price follows partial eviction as matter of right, and the amount of the diminution is made neither greater nor less by any fraud practiced on the buyer to induce him to buy. *Massie vs. Loque*, 109 La. 774 (33 Sou. 764).

When three persons, of whom two are experienced lumbermen, buy a logging contract, and logging outfit, after inspection, the purchasers cannot be relieved on the plea that the oxen were in bad condition, and that the quantity and distance of the timber were misrepresented, especially where the representations were not based upon computation by experts. *Forsman vs. Mace*, 111 La. 29 (35 Sou. 372).

Fraud must be caused or continued by artifice, by which is meant either an assertion of what is false, or a suppression of what is true, in relation to what is a material part of the contract. *Eugene Dietzgen Co. vs. Kokosky*, 113 La. 455 (37 Sou. 24).

Refer to Arts. 1891, 1892, 1893, 1895.

Art. 1848.

In the matter of sales, the vendee, who pays the price, goes into possession, improves the property and pays the taxes, is presumed to be in good faith until the contrary is shown. If there is nothing to show knowledge of a fact, not apparent, or which downright negligence alone could have overlooked, it should not be concluded that one was not sincere in his purchase or sought to take advantage. *Mendelsohn, Wife, Authorized, vs. Armstrong*, 52 La. An. 1302 (27 Sou. 735).

Refer to Arts. 3481, 3482.

Art. 1850.

The defendant, having obtained, through a supplemental agreement, a continuance of the contract to full completion, which was to its advantage, could not, after obtaining the resulting benefits, repudiate the agreement under Art. 1850. *Moorman vs. Plummer Lbr. Co.*, 113 La. 430 (37 Sou. 17).

Refer to Arts. 1859, 1863.

Art. 1851.

When fear enough is brought to bear as to operate on a person of ordinary firmness regarding his reputation or fortune, it will vitiate a contract on account of it, and this, although the party in whose favor the contract is made did not bring the fear to bear, and was ignorant of it. Contracts made voidable through error or violence may be avoided by exception to suits brought for their enforcement. *Bryant & Mathers vs. M. Levy & Sons*, 52 La. An. 1649 (28 Sou. 191).

Marriage, as a civil contract, is not valid where the parties have not freely consented, and consent is not free where it is extorted by violence of threats. A marriage is properly annulled where the consent of the complainant was procured by violence of such a nature as to inspire a just fear of great bodily harm. *Quealy vs. Waldron*, 126 La. 258 (52 Sou. 479).

Refer to Art. 1852.

Art. 1852. See all of Art. 1851.**Art. 1853. See Art. 1860, 109 La. 948.**

Defendant cannot be set up, as discharging his liability upon the notes, that plaintiffs, after binding themselves not to prosecute a certain person, had violated their promise and caused him to be indicted. If there was any defense to the notes, it would have resulted from the plaintiffs having promised as a condition of the execution of the note, not to prosecute the person, and not from the breaking of the promise. *Yoel & Williams vs. Walker*, 118 La. 29 (42 Sou. 635).

Refer to Arts. 1855, 1856, 1893, 1895, 2031.

Art. 1855. See Art. 1853, 118 La. 42; Art. 111, 126 La. 285.

A judgment in favor of a lessor for rent, or for eviction of a tenant, concludes all questions as to the existence and validity of the lease, and all special defenses, like fraud or duress, that were or might have been urged in the suit. A contract of sale of real estate, made under duress, is not absolutely null and void; but it is merely voidable. Such a sale is ratified by a subsequent valid lease of the same land be-

tween the parties. *Harvin vs. Blackman*, 121 La. 431 (46 Sou. 525).

Refer to Arts. 1881, 2272.

Art. 1856. See Art. 1853, 118 La. 42.

Art. 1859. See Art. 1850, 113 La. 434.

Art. 1860. See Art. 1870, 107 La. 112.

It is permissible to sue to avoid a sale for lesion in the court of the situs of the property, because the action is one in revindication of real property. The adaptability of the land in question for a site for an irrigating pumping plant is one thing; its availability for such purpose another thing. If adaptability is neutralized by non-availability, growing out of the fact that the tract is cut off from the water supply by the lands of others, adaptability counts for little or nothing in determining value. *Smart vs. Bibbins*, 109 La. 986 (34 Sou. 49).

Where an act of conveyance recites the consideration of the sale to be a certain sum named "and other valuable consideration" it is competent, in an action to annul the sale for lesion beyond moiety, to show by parol testimony what the true consideration was. Where lesion beyond moiety is alleged to invalidate a sale the value of the property in the state in which it was at the time of the sale is the criterion, and against this is to be measured the considerations received or enjoyed by the vendor, and which constitute the moving cause to him to part with his property, and the value of the same to him at the time. *Linkswiler vs. Hoffmann*, 109 La. 948 (34 Sou. 34).

Where a plaintiff alleges that he has sold certain immovable property, the value of which is \$1,500, for \$200, and that the inequality of the price paid renders the sale null and void, the fact that he also alleges that he made the sale by reason of error of the value of the property, superinduced by misrepresentation on the part of the defendant, does not deprive the proceeding of its character of an action to rescind for lesion beyond moiety. The tender of the price received is not a condition precedent to the bringing and maintenance of this action. *Ware vs. Couvillion*, 112 La. 43 (34 Sou. 220).

It is a right of property. In order to maintain the action it is not necessary to allege fraud. The creditor can exercise all rights save those not merely personal, and where the creditor refuses to sue to set aside the lesion in a sale the action may be brought and sustained by a creditor. *Belcher & Creswell vs. Johnson*, 114 La. 641 (38 Sou. 481).

Plaintiff, as transferee of the original lessee, sues for the enforcement of a contract whereby the owner of forty acres of land, lying in a field and state from which no oil had ever been produced, and having a value of \$10 an acre, leased the same for the sole purpose of operating for oil and gas, for a term of ten years, or so long as oil or gas should be produced. The lessee agreed to begin operations within three months' delay, or pay \$50 quarterly in advance for each three months' delay, and to deliver the owner the equivalent of one-eighth of the oil saved, and of the gas marketed. *Held*, that the consideration as expressed in the contract, is adequate for its support, both upon the face of the papers and in the light of the testimony. *Jennings-Haywood Oil Syndicate vs. Houssiere-Latreille Oil Co.*, 119 La. 793 (44 Sou. 481).

Refer to Arts. 1853, 1861, 1863, 1870, 1871, 1877, 1991, 2464, 2589, 2590, 2591, 2592, 2598, 2599, 3182.

Art. 1861. See Art. 1860, 109 La. 955, 109 La. 987, 112 La. 45, and 119 La. 826.

In sales of real estate, the vendor may be relieved if the price given is less than one-half of the value of the property sold (Arts. 1861, 1862, 2589, 2590). In such case the burden is on the vendor to prove lesion beyond moiety by evidence peculiarly strong and convincing, and of such a nature as to exclude speculation and conjecture. *Girault vs. Feucht*, 120 La. 1070 (46 Sou. 26).

Timber sold while standing on the land of the vendor continues to be an immovable. The sale of timber comes within the provisions of Art. 1861 in regard to lesion. See Act No. 188 of 1904. To support the action of lesion there is no need to show fraud, for the action of lesion is founded on implied error of the vendor or imposition upon him. *Hyde vs. Barron* 125 La. 228 (51 Sou. 126).

The action of lesion beyond moiety does not extend to a third person purchasing from a vendee to obtain the land

at an inadequate price when such third person is in good faith. Neither does the action of lesion extend to him when he had knowledge of the inadequacy of the price in the first sale, when he himself had paid a fair and adequate price, for he cannot be dispossessed of his property on the ground that a prior owner chose to part with his property at an inadequate price. *Morgan vs. O'Bannon & Julian*, 125 La. 367 (51 Sou. 293).

Refer to Arts. 1862, 2589, 2590.

Art. 1862. See Art. 465, 123 La. 962; Art. 1861, 120 La. 1070.

Art. 1863. See Art. 1850, 113 La. 434; Art. 1860, 119 La. 825.

Art. 1870. See Art. 1860, 109 La. 955, 120 La. 1074, and Art. 1933, 115 La. 1.

In setting forth a cause of action for annulling a sale because of lesion it is not necessary to allege that the complainant, or anyone else, is willing to buy the property at double the amount of the price of the sale complained of. It is sufficient to allege the discrepancy between the price and value. The fact of anyone being willing to buy the property at the increased appraisement is merely a fact to be considered on the merits in proof of the alleged greater value. *Watkins vs. Land & Lumber Co., Ltd.*, 107 La. 107 (31 Sou. 683).

Refer to Arts. 2589, 2590, 2591.

Art. 1871. See Art. 1860, 109 La. 955.

In fixing the value of the property, the price must be considered as of the day of the sale, and the value of the property, in order to support the action of lesion, must not be left to conjecture, but must be fixed and certain, and in fixing this value a high estimate will not recommend itself to the Court. *Hyde vs. Barron*, 125 La. 228 (51 Sou. 126).

Art. 1877. See *Smart vs. Bibbins*, 109 La. 987; Art. 1860, 109 La. 987.

Art. 1881. See *Stubbs vs. Lea*, 105 La. 656; Art. 1855, 121 La. 436.

Art. 1882. See *Bryant & Mathers vs. Levy & Son*, 52 La. An. 1661.

Art. 1883.

Where A and B adjoining tracts of land, join in the lease of same to C, for the term of ninety-nine years, for the purposes of prospecting for oil, gas, etc., and other minerals, during that period for the consideration of one dollar and a royalty of one cent for each barrel of oil sold, and the same proportionate value of all other minerals, A to have one-third of the royalty accruing from the land of B and *vice versa*; and where C did not bind or obligate himself to do any work on the premises: *Held*, that such an agreement is not a contract of lease, but a mere permit or license revocable and terminable at will. *Martel vs. Jennings-Haywood Oil Syndicate*, 114 La. 351 (38 Sou. 253).

Art. 1885. See *Art. 11*, 116 La. 76; *Art. 1764*, 116 La. 345.

Art. 1886. See *Art. 11*, 116 La. 76; *Art. 1803*, 122 La. 1061.

Art. 1887. See *Rudolph vs. Coster*, 119 La. 790; *Art. 984*, 104 La. 457.

No one is heir of the living. A transaction based upon the idea of a future right to the succession of one living is devoid of consideration. Though such a stipulation may have been valid in West Virginia, it can have no effect under the civil law. The original act of sale between the first vendor and his vendee was not based on real and substantial consideration, as between vendor and vendee, and third persons. *Cox et al. vs. Bon Ahlefeldt et al.*, 105 La. 543 (30 Sou. 175).

The consideration was the transfer of the vendor's interest in the existing batture, and the reservation of future accretions. Whether such accretions, where formed, should become the property of the vendor or vendee, did not concern the public. And the contract was valid under Art. 1887. *Minor's Heirs, vs. City of New Orleans*, 115 La. 307 (38 Sou. 999).

Art. 1890. See Art. 727, 111 La. 78.

The obligation of two or more persons, who intervene in an act of sale to a corporation and give their personal guarantee, that for a period of years its shares of preferred stock shall annually earn and pay a dividend of ten per cent. is joint as to the obligors and not in *solido*. Such a covenant evidences an independent stipulation *pour autrui*, and not a contract or suretyship; and the obligation of the intervenor is different and distinct from that of the corporation. *Poyner vs. McDonald et al.*, 52 La. 397 (27 Sou. 91).

If, as the consequence of acts of commission or omission, the solidary liability of two or more persons to another arises, such persons may be sued at one and the same time in the same action for a judgment *in solido* against them. The power residing in the municipality to provide for a supply of water is, in its nature, legislative and governmental, and if not exercised, and, in consequence, loss results to property owners by fires occurring, the municipality is not liable in damages. The same is true where a city undertakes to provide for a supply of water by contract with a private company, which fails to meet its obligations. *Planters' Oil Mill vs. Monroe W. W. & L. Co. et al.*, 52 La. An. 1243 (27 Sou. 684).

The assumption in an act of sale of a city tax is not a stipulation *pour autrui* for the benefit of the city, but is a matter purely personal to the contracting parties and forming part of the consideration of their contract. *Homestead Assn. vs. Garland*, 107 La. 476 (31 Sou. 892).

Plaintiff traces her title to her father as her author. He acted in his own behalf. His daughter was a minor. He sold the property before she arrived at her majority, and it passed into the hands of a third person. Third persons are not estopped by the recitals in a deed to which they are not parties, as there was no donation in this case. *Lyons vs. Lawrence*, 118 La. 461 (43 Sou. 51).

The stipulation *pour autrui* must be kept alive and payments made in accordance with the agreement. If it loses vitality, the beneficiary cannot recover. This was a suit on an insurance policy in which the premiums had been allowed to lapse. *Lesseps vs. Fidelity Mutual Life Ins. Co.*, 120 La. 618 (45 Sou. 522).

Refer to Arts. 1902, 1926, 2052, 2053, 2054, 2057, 2061, 2080, 2090, 2093, 3035, 3036, 3037, 3039.

Art. 1891. See Art. 1847, 111 La. 32, and 118 La. 598.

Under C. C. Art. 2804, a partnership formed to conduct gambling by playing draw and stud poker, is void as contrary to public policy, as evidenced by Art. 188 of the Constitution and Civil Code, Arts. 1893, 1895, 2983, and Code of Practice, Art. 19; the word vice in these articles meaning a moral fault or failure, especially immoral conduct or habits. A partner may not sue his co-partner for any definite sum as his share of the profits of the firm, but only for a settlement of the partnership. *Martin vs. Seabaugh*, 128 La. 442 (54 Sou. 935).

Refer to Art. 1895.

Art. 1892. See Art. 1847, 118 La. 598; Art. 1891, 128 La. 446.**Art. 1893. See Art. 1853, 118 La. 43; Art. 1847, 118 La. 598; Banks vs. Sutcliffe, 122 La. 454; Art. 1800, 122 La. 454; Art. 1891, 128 La. 442.**

The assignment of the unearned part of his salary by a public officer is against public policy and void. *McGowan vs. City of New Orleans*, 118 La. 429 (43 Sou. 40).

A defendant sued upon the written obligations signed by himself alone in character and without a taint upon their face, carries the burden of showing by clear evidence that they were given for an illegal consideration. (See Art. 1853.) *Yowell & Williams vs. Walker*, 118 La. 28 (42 Sou. 635).

Refer to Arts. 1892, 1895, 2804, 2983.

Art. 1894. See Arts. 1777 and 774, 107 La. 774.

Where the consideration of an executed contract of sale of land is not expressed, the agreement is not the less valid, and a just consideration will always be presumed, unless the contrary be proved. A stranger to such a conveyance and to the parties has no standing to impeach transfer on the sole ground that no price or other consideration is expressed on the face of the instrument. *Read vs. Hewitt*, 120 La. 288 (45 Sou. 143).

Art. 1895. See Art. 488, 119 La. 284; Art. 1891, 128 La. 442; Art. 1893, 118 La. 43; Art. 1853, 118 La. 433; Art. 1847, 118 La. 598.

Art. 1896. See Art. 1800, 122 La. 454.

A lease by a riparian proprietor of a portion of the front of his property is a predial lease. The lessees have been evicted from a portion of the property leased exceeding one-twentieth part, and they are entitled to relief whether their rights be tested by Arts. 2494, 1896, 1897, 2681, 2682 or 2696 of the Civil Code. *Fabrigas vs. Wood*, 105 La. 26 (29 Sou. 367).

Refer to Arts. 1897, 1898, 1899, 2494, 2681, 2682, 2696.

Art. 1897. See Dietzen Co. vs. Kokosky, 113 La. 455; Art. 1800, 122 La. 454; Art. 1896, 105 La. 26.

Where a judgment creditor institutes an action against a husband and wife to have a *dation en paiement* set aside as simulated and fraudulent, and prays to have the property covered by the same, seized and sold to pay his judgment, it is the duty of the parties, if the property is exempt from seizure and sale under the homestead laws, to set up contingently, and in the alternative that right of exemption in the pending suit. *Babineau vs. Guilbeau & Sheriff*, 52 La. An. 992 (27 Sou. 549).

When the orange grove of the defendant ceased to exist, the contract between him and the plaintiff became a contract "without cause," in which he sold all the oranges that would grow in the coming two years. *Losecco vs. Gregory*, 108 La. 655 (32 Sou. 985). [Reversed on rehearing.]

He was not sent away by defendant; his employment ended under the terms of the contract. There is no question of recondition involved. The contract authorized the splitting of the year's employment into parts, and under the exercise of this right the plaintiff could only claim salary from the beginning of the year up to the date of liquidation, and Art. 1897 does not apply. *Becnell vs. Plantation Company, Ltd.*, 105 La. 677 (30 Sou. 152).

Refer to Arts. 1898, 1899, 2748.

Art. 1898. See Art. 1896, 105 La. 677; Art. 1897, 108 La. 655.

Thus in leases for ten years the obligation to pay the yearly rental ceases if the property, which is leased, should be destroyed. The contract in this case is one which under Civil Code is designated as a "contract to give." If, in a contract of that character the obligation to deliver is an object, which is particularly specified, it is perfect by the mere consent of the parties. It renders the creditor the owner if it be not delivered, puts the thing at his risk from the date of the obligation, if the contract is one of those, which purports a transfer. If, however, the debtor is in default for not having made the delivery, it is at his risk from the time of the default. *Kent vs. Davis Bros. Lbr. Co.*, 122 La. 1062 (48 Sou. 451).

Refer to Art. 1899.

Art. 1899. See Art. 1896, 105 La. 689, and 108 La. 655; Art. 1898, 122 La. 1062.

Art. 1900. See Dietzen Co. vs. Kokosky, 113 La. 455; Art. 1764, 122 La. 101; Art. 1497, 119 La. 355.

It does not follow, because no money actually passed between the parties at the time of the sale, that therefore the sale was unreal. A pre-existing debt due by the transferer of property to his transferee, supports the transfer. *Levert, Burgieres & Co. vs. Hebert*, 51 La. An. 222 (25 Sou. 118).

According to the authentic act evidencing it, it was a *dation en paiement*, was in reality a sale, and only part of the price was paid, the deceased remaining indebted to the defendant for the remainder. Such evidence would contradict the written act, but as explanatory of the consideration of a note given by the deceased to one of the defendants, and in rebuttal of the allegation that such note was without consideration, parol is admissible to show that the transfer of property in question was not a *dation en paiement*, but a sale, and that the note in question was given in payment of the price. Such testimony does not deny the transfer of the property nor the payment of the price, but merely explains the manner of the payment and accounts

for the giving of the note. *Clark vs. Heddin*, 109 La. 147 (33 Sou. 116).

In the act by which the sister who held the legal title to the property transferred the same to the wife, it was recited that the latter was separated in property from her husband, and that she was buying the property for her separate account with her own funds, under an authorization from the Court. The act of transfer was by notarial act. The husband intervened in this act to authorize his wife to buy and signed the act. In the present action he seeks to have the two acts declared simulated. *Held*, he is estopped from so doing. *Nuss vs. Nuss*, 112 La. 279 (36 Sou. 345).

It is a matter of frequent occurrence for parties from different motives to place the legal title of their property in the name of another under acts whose recitals do not correctly state the facts of the case. Such acts not only are not necessarily absolutely null, but they are not voidable if no law has thereby been transgressed and the cause of the same was legitimate. *Griffith vs. Alcocke*, 113 La. 514 (37 Sou. 47).

Parties must be held bound by recital of deed to immoveable property, and after many years the change that would result in showing that, instead of the husband being the buyer of property, the wife was really the donee, cannot, on the testimony tendered be made. *Pressler & Tier vs. Walker*, 116 La. 661 (40 Sou. 133).

N, by authentic and duly recorded act, transferred the legal title to certain property to S, to be taken by him, sold and the proceeds applied to the payment of N's debts. The property was accordingly sold, and the proceeds applied as directed to W, the act of sale being duly recorded with full and complete description.

N subsequently sold the same property to P, who brought a petitory action to recover it from W on the ground, among others, that the description of the property in the act from N to S was insufficient to carry the title, and because the consideration of that transfer was the withdrawal of a criminal prosecution against the transferror. *Held*, that under the circumstances N could not ignore the

sale to W and recover the property, nor could P do so. *Phe-lan vs. Wilson*, 114 La. 813 (38 Sou. 570).

Refer to Arts. 2276, 2428, 2446.

Art. 1901. See Art. 432, 110 La. 163 (in respect to the meaning and effect of good faith); Art. 1887, 115 La. 307.

The plaintiff sold to the defendant an article of commerce, for which the defendant executed the notes sued on. The sale was complete. A warehouse receipt was issued to defendant, recognizing him as owner, and providing that, upon payment of the price and return of the receipt, he would take the property. The sale was perfect between the parties. *Julius Kessler & Co. vs. Monheim*, 114 La. 619 (38 Sou. 473).

A stipulation in an act of mortgage that, in the event of the failure of the mortgagor to pay any one of a series of notes, the remainder shall "become due and exigible by foreclosure," is a lawful agreement binding on the parties to the contract, and the plaintiff may use both the executory and the ordinary processes. *Robson vs. Beasley*, 118 La. 738 (43 Sou. 391).

One who, upon faith in the public record, purchases real estate, the reported title to which stands in the name of his vendor, to be protected in his purchase against any claim or equities arising out of the previously existing relations between his vendor and the latter's author, or other persons. *Breaux vs. Royer*, 129 La. 894 (57 Sou. 164).

Refer to Arts. 2236, 2456, 2457.

Art. 1902. See all of Art. 1890.

Art. 1903. See Art. 2490, 51 La. An. 220.

Art. 1905.

That incorporeal rights, not negotiable or indorsed to bearer, are transferred only by formal written transfer in addition to delivery of the evidences of the rights. Shares of stock are incorporeal things and cannot be donated *inter vivos* except by act before a notary and two witnesses. *Succession of Sinnot vs. Bank et al.*, 105 La. 711 (30 Sou. 233).

Refer to Art. 2481.

Art. 1908.

The continued possession by the creditors of a note pledged as collateral operates a suspension of prescription on the principle obligation after the collateral note is prescribed on its face. In such a case the remedy of the pledgor is for damages sustained by reason of the laches of the pledgee, who is responsible for the net sum he might have collected by legal proceedings seasonably instituted. *Meyer Bros. vs. Colvin*, 122 La. 153 (47 Sou. 447).

Refer to Art. 3175.

Art. 1911. See Art. 1763, 118 La. 451; Art. 1933, 119 La. 854, and 126 La. 190.

The institution of a suit is one of the modes of putting in default. *E. Sondheimer & Co. vs. Richland Lbr. Co.*, 121 La. 787 (46 Sou. 806).

Art. 1912. See Art. 1933, 177 La. 1034, 119 La. 832, 119 La. 855, and 126 La. 190.

He has been acquitted in a criminal prosecution, obtained a discharge from his sureties, and elected to the office he now occupies. There was no undue or any other influence (in so far as the record discloses) towards obtaining a settlement. It is not evident that the present suit can be maintained, to the end of having him declared ineligible and ousted from office to which he has been elected since the suit was brought. None the less the decree is not predicated on that ground. The decision is based on the fact that he was not a defaulter at the time that he was elected to the office he now holds, as he had settled with his bondsmen. *State ex rel. Stewart vs. Reid*, 122 La. 591 (47 Sou. 912).

Art. 1913. See Art. 1933, 119 La. 832, and 126 La. 174.

The putting in default in the presence of an acknowledged inability to perform, or in case of an absolute denial of the existence of any contract, cannot be exacted. *Cotton vs. Irrigation Co.*, 108 La. 4 (32 Sou. 193).

This was a contract for linters, grabbots and flues bought by the defendant from the plaintiffs, and has been partly executed. The contract was not indivisible. It was not a unit in the sense that the plaintiffs could withhold part of the output and obtain damages from the defendants for

not accepting the remainder. To recover damages, he vendor must begin by showing that he has complied with the terms of the contract; otherwise, he cannot be heard to say that he must be reinstated in the situation in which things were at the date the contract was entered into. *Barrow & LeBlanc vs. Penick & Ford*, 110 La. 572, overruled in *Shreveport Cotton Oil Co. vs. Friedlander et al.*, 112 La. 1059 (36 Sou. 853).

Where a buyer of lumber failed to pay for it as provided by the contract, and the seller stopped delivering after endeavoring in vain to collect the overdue payments, the buyer could not recover damages for the seller's refusal to further perform, under Art. 1913. *Sitman & Burton vs. Lindsey*, 123 La. 53 (48 Sou. 646).

A party cannot claim damages for the non-performance of a contract as to which he himself is in default. *Silberman vs. Caddo Gas & Oil Co.*, 127 La. 928 (54 Sou. 289).

Refer to Art. 1915.

Art. 1914.

In an action by the husband for separation from bed and board on the ground of abandonment, the wife is entitled to exercise her right of going to live with him up to and until a judgment has been rendered by the trial Court ordering her to do so, and notices of that judgment have been legally served upon her. Until all its legal requirements have been complied with, the trial Court is not authorized to render a definitive judgment of separation. *King vs. King*, 122 La. 582 (47 Sou. 909).

Art. 1915. See Art. 1913, 127 La. 930; Art. 1913, 123 La. 53.

In receiving the order for a certain quantity of whiskey to be supplied from a general stock, but without identification of the particular whiskey, S merely entered into an executory contract for the sale of whiskey, and which became effective only when specific whiskey was thereafter appropriated; and such appropriation took place only when it was delivered to the public carrier consigned to the person who had ordered it. *State vs. Shields et al.*, 110 La. 547 (34 Sou. 673).

Refer to Arts. 1917, 2458.

Art. 1916. See Art. 1915, 110 La. 547.

Art. 1917. See Art. 1915, 110 La. 547.

Art. 1920.

Where, by written contract, the owner declares that he sells and delivers, for a price paid in cash, all the merchantable pine timber on a certain tract of land, the contract is one of sale. *Smith vs. Huie-Hodge Lbr. Co.*, 123 La. 959 (49 Sou. 655).

Refer to Art. 2459.

Art. 1922. See Art. 871, 52 La. An. 269.

The thing which constituted an object of the transfer was not the future moneys themselves which were to accrue under the railroad contract. Had the transfer been of the future moneys themselves, there could have been no actual delivery until, by having been earned, these future moneys had come into existence (for a non-existing thing cannot be actually delivered); and, as a consequence, the effect of the transfer would until then have been confined strictly to the parties, and the rights of third persons would not have been in the slightest degree affected. *Cox vs. First National Bank*, 126 La. 99 (52 Sou. 227).

Refer to Art. 2247.

Art. 1926. See Art. 1890, 106 La. 574; Art. 1933, 119 La. 832; Art. 1890, 52 La. An. 1249; Atkins vs. Shreveport & R. R. Valley Ry., 106 La. 574.

Plaintiff sued a corporation, alleging that, though it had bound itself by contract to do a certain thing, it had failed so to do, and he had suffered heavy damages. He prayed for specific performance of the contract; and, should the Court hold that plaintiff was not entitled to specific performance, then he prayed for damages. Plaintiff afterwards expressly waived his demand for specific performance. Held, that no judgment could be rendered for the plaintiff as a contingency upon which the alternative demand was based could not arise. *John B. Honor Co. vs. Stevedore' & Longshoremen's Benevolent Assn.*, 114 La. 361 (38 Sou. 271).

Where, under such compromise lease (as shown in Art. 1883, 114 La. 351), the tract of land was developed into an

oil-bearing territory: *Held*, that plaintiffs, as owners of an interest in the land, are entitled to a like interest in the oil produced, less all expenses of production. *Martel vs. Jennings-Heywood Oil Syndicate*, 114 La. 351 (38 Sou. 253).

If the owner had a right of action to set aside the lease, he has no right to an action in which the lease is not mentioned and no allegation is made to have its dissolution decreed. The right to resume possession could not arise until default is made by the lessee, both in not exploring the land for oil and in not paying for the delay. The appearance of a contract has binding effect after execution. There was, for a time at least, the appearance of the contract, by which plaintiffs are held bound. *Houssiere-Latreille Oil Co. vs. Jennings-Heywood Oil Syndicate*, 115 La. 107 (38 Sou. 932).

In a promise of sale a clause which stipulates that part of the price is to be deposited in bank in the joint names of the parties until the title is examined, and to be paid to the vendor when the act of sale is passed, or to be returned to the vendee in the event the title is rejected, does not constitute a purely potestative condition. It means nothing more than that the sale is made subject to the examination of title. *Girault vs. Feucht*, 117 La. 277 (41 Sou. 572).

In all these cases given in Art. 1926, damages may be given, where they have accrued, according to the rules established in the succeeding section; and Art. 2486 declares that in all cases the seller is liable to damages if there result any detriment to the buyer occasioned by non-delivery at the time agreed on. *Held*, that the vendee was not required to elect between specific performance and damages, but was entitled in a suit for performance to recover damages. *Manning vs. Cohen*, 124 La. 870 (50 Sou. 778).

Refer to Arts. 1927, 1930, 1931, 1950, 1951, 2034, 2035, 2037, 2275, 2439, 2440, 2462, 2486.

Art. 1927. See Art. 1926, 114 La. 361, and 117 La. 280.

A judgment ordering specific performance of a contract "to do" will not be rendered where its execution appears to be impracticable, and where the parties seeking such relief appear to have an adequate remedy in an action for damages. *Gauche vs. Metropolitan Bldg. Co.*, 125 La. 530 (51 Sou. 578).

Art. 1930. See Arts. 662 and 2490, 51 La. An. 220; Art. 1926, 52 La. An. 1249.

A manufacturer who disposes of the things which he has manufactured is properly and legitimately held presumptively to a knowledge of the qualities of the things he sells. *George vs. Shreveport Cotton Oil Co.*, 114 La. 498 (38 Sou. 432).

Damages resulting from injury to feelings, reputation and standing are recognized in this State as actual or compensatory, as contradistinguished from exemplary or vindictive, damages; and where they arise *ex contractu*, and the liability of the obligor is fixed by his being put in default, there is no reason why they should not be recovered in the same manner, and to the same extent, as damages to person or property. *Johnson vs. Levy*, 118 La. 448 (43 Sou. 46).

Refer to Art. 1931.

Art. 1931. See Art. 1926, 52 La. An. 1249; Art. 1933, 126 La. 190, and 106 La. 577, and 119 La. 854; Art. 1930, 118 La. 451.

An instrument in writing which recites that "we hereby guarantee that the Town of Homer will furnish a free right of way to the L. & N. W. Ry. Co. to the Arkansas line" is, in terms and in legal effect, an ordinary contract of commercial guaranty, and the parties signing same bind themselves jointly. It did not require any action on the part of the Town of Homer. No formal notification of acceptance on the part of the railroad company was necessary. Its terms are equivalent to a guaranty that the municipality would vote a special tax in aid of the construction of the railroad, and that was a good consideration. *L. & N. W. Ry. Co. vs. Dillard*, 51 La. An. 1484 (26 Sou. 451).

Where one makes a promise to sell real estate which he has already bound himself to sell to another, and subsequently admits to the promisee that he is unable to deliver it, he is liable to the latter for the double of the earnest received by him, and this without being put in default. *Smith vs. Hussey*, 119 La. 32 (43 Sou. 902).

Refer to Arts. 1932, 2462, 2463.

Art. 1932. See Art. 1931, 51 La. An. 1484, and 119 La. 32; Art. 1933, 106 La. 577.

Art. 1933. See Advance Thresher Co. vs. Royer, 123 La. 1080; Art. 1763, 118 La. 447.

Paragraph 1.

Since it could only earn the tax by running the boats, a putting *in mora* was not required. When the company failed to run the boats according to the intent of its contract, there was what is considered the equivalent of an active violation of the contract; and this rendered demand and putting in default unnecessary. *Atkins vs. Railway Co.*, 106 La. 577 (31 Sou. 166).

Damages are recoverable for deprivation of intellectual enjoyment and from mental suffering resulting from the breach of a contract. In computing damages for breach of a contract of a milliner to furnish the trousseau of a bride of wealth, the Court will take into consideration not only the disappointment of the bride in not having the dresses for the wedding, but also the fact that entertainments had been planned in her honor on the wedding tour and at her arrival home, which she would have to forego for want of clothes; and putting in default is unnecessary. *Lewis vs. Holmes*, 109 La. 1030 (34 Sou. 59).

The basis and measure of damages was the loss of cane, which defendant met with because the cars were not delivered in time. The violation was positive, and not passive. Default was not necessary. *Chattanooga Car & Foundry Co. vs. Le Febvre*, 113 La. 488 (37 Sou. 38).

A contract to do is breached by the failure of the obligor to perform within the time agreed upon, and it then becomes optional with the obligee to claim the rescission of the contract for damages; and only in the latter event does he need to put the obligor in default as a prerequisite to bringing suit. *Murray vs. Barnhardt*, 117 La. 1023 (42 Sou. 489).

Where the contract has been violated by not doing what was covenanted to be done within the time stipulated, the putting in default is not a prerequisite to a suit in rescission. Such putting in default is a prerequisite only to the

recovery of future damages. When the contract has been violated by the obligor, the obligee may refuse to allow the contractor to perform; and, in case of suit by the contractor, may plead the breach of the contract by way of acceptance. *Jennings-Heywood Oil Syndicate vs. Houssiere-Latreille Oil Co.*, 119 La. 795 (44 Sou. 481).

Where the putting of the debtor in default is a prerequisite to the recovery of damages in ordinary cases, it is also a prerequisite to the recovery of liquidated damages, or the penalty stipulated for delay in the performance of the contract. *Godchaux vs. Hyde*, 126 La. 187 (52 Sou. 269).

If, when the evidence was all in, the Judge found that no putting in default had been proved, it was entirely proper for him to disregard all the evidence so introduced which tended to support defendant's claim for damages. *Darragh vs. Vicknair*, 126 La. 174 (52 Sou. 264).

Paragraphs 2, 3 and 4.

Damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived; and this same rule with some modification applies to damages in other cases. The allegations should be specific and direct; besides this, the damages which the relator sets up are not damages actually accrued, but for assumed, prospective and contingent profits. *State ex rel. McMain vs. Pollock*, 108 La. 597 (32 Sou. 353).

The destruction of the orange trees was the destruction of the subject-matter on which the contract was to operate. The term "*vis major*" is used in the civil law the same way as the words "act of God" are used in the common law. These are not considered included in the assumption of risks such as are disclosed here. To be held so included, it must fairly appear that such was the intention of the parties. *Held*, that *vis major* was within the intention of the parties. (See C. C., Arts. 1776, 1933, 2743, 2219, 2120, 2697, 2754, 2939, 2970; 120 U. S. 731.) *Losecco vs. Gregory*, 108 La. 655 (32 Sou. 985).

While common carriers are not considered under the Civil Code as insurers against loss or damage by fire, they are liable "unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events." (C. C. 1870, 2754.) *Lehman, Stern & Co. vs. Morgan's La. & Texas R. R. & S. S. Co.*, 115 La. 1 (38 Sou. 873).

If, as the result of tortious acts of third parties, the property leased has become entirely unfit for the purposes for which it was leased, and has to be reconstructed, the lessee has the right to have the lease canceled and himself decreed absolved from payment of the rent stipulated in the contract of lease. The lessee would not be entitled additionally to recover from the lessor damages for profits which (but for such disturbances) plaintiff might have earned during the lease. *Reynolds vs. Egan*, 123 La. 296 (48 Sou. 940).

Casualty means inevitable accident, or what the Civil Code calls a "fortuitous" event. A cause beyond human control may be a "fortuitous event" or "irresistible force." By irresistible force is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable. It may result also from a cause beyond human control. *Cook & Laurie Contracting Co. vs. Denis*, 124 La. 161 (49 Sou. 1014).

The burden is on the defendant to show that the in-execution of the contract on his part was occasioned by a fortuitous event or irresistible force. *Brannon vs. Y. & M. V. Ry.*, 129 La. 918 (57 Sou. 172).

Refer to Arts. 1870, 1911, 1912, 1913, 1926, 1931, 1932, 1934, 1964, 1965, 2064, 2047, 2120, 2125, 2126, 2127, 2219, 2692, 2697, 2699, 2700, 2743, 2754, 2939, 2970.

Art. 1934. See Art. 1933, 109 La. 1030, and 126 La. 187; Art. 1763, 118 La. 447; Art. 2315, 120 La. 1010, and 109 La. 1073 (Miscellaneous Torts); Reynolds vs. Egan, 123 La. 308; Art. 1933.

General Interpretation.

An employer who places an inexperienced youth around machinery at a dangerous place is charged with the duty of giving such notice and warning; and, if he fails to do so, is liable for damages. If the injury came from the negligence of his fellow-workmen, the employer would be liable for his own fault in placing the injured party at work in such a place without warning, but there would be no vindictive damages. An unskillful, or even an imprudent, act

on the part of the workman is not necessarily a fault on his part. *Lindsey vs. Lbr. Co.*, 108 La. 468 (32 Sou. 464).

The damages which the relator sets up are not actually accrued, but for assumed, prospective and contingent profits. This is not sufficient to give jurisdiction *ratione materiae* to the Supreme Court. *State ex rel. McMain vs. Pollock*, 108 La. 597 (32 Sou. 353).

When there has been a violation of a contract to deliver lumber of specified grades and stipulated quantity within a time named, the party to whom the delivery was to be made is entitled to recover the amount of the losses he has sustained and the profits of which he has been deprived. *Williams & Co. vs. Bienvenue*, 109 La. 1023 (34 Sou. 63).

Not being able to secure the timely transmission to New Orleans of his cotton in the compress at Homer, he bought other cotton in New Orleans to replace it. He has a cause of action to recover the amount representing the difference in price between the two lots of cotton—the one in the compress at Homer, which he could not get out in time, and the one he purchased in New Orleans to make delivery with. *Loeb vs. Homer Compress & Mfg. Co.*, 111 La. 727 (35 Sou. 843).

The measure of a buyer's damages for the seller's breach to deliver is the difference between the contract price and the market price. A printed price list of cypress lumber prepared by an association controlling a large part of the cypress output of the country, and acted on in making sales, is admissible to show the current market price of cypress lumber. *Hafner Mfg. Co. vs. Lieber Lbr. & Shingle Co.*, 127 La. 350 (53 Sou. 646).

In the assessment of the damages in case of loss of life, our law vests much discretion in the Judge or jury. *Underwood vs. Gulf Refining Co.*, 128 La. 1003 (55 Sou. 641).

Plaintiff is entitled to damages based on the amount of loss it has sustained and the amount of profit of which it has been deprived. As plaintiff failed to show that it minimized its damages for the year 1909, it will not be permitted to recover for a violation of the contract for that year. *New Iberia Sugar Co. vs. Lagard*, 130 La. — (58 Sou. 16).

Paragraph 1.

This is an action for damages for the breach of an obligation of the carriers to carry goods in bond. Plaintiff's instructions were not misleading, but in all respects were clear enough. The reasons of plaintiff for desiring the goods to come from Charleston in bond were evident enough to warn defendants not to take them out of bond. Proper papers were delivered by plaintiff for obtaining the goods to be carried in bond. The goods were taken out of bond without authority, and were, in consequence, of less value at the point of destination. The defendants are liable in damages which might have been foreseen. *Smith Bros. & Co., Ltd., vs. R. R. Co. et al.*, 106 La. 11 (30 Sou. 265).

Allowing profit on a lease to the period covered by the renewal privilege would be stretching the doctrine too far. It would be trenching too much upon damages of a character remote and speculative. A lessor can be compelled to repair the building he lets, but he cannot be compelled to reconstruct the building. *Jackson vs. Doll*, 109 La. 230 (32 Sou. 207).

While consequential damages cannot always be recovered, plaintiff may legally demand that the character of damages is justly due her. They are legally demandable against the lessee when they, to his knowledge, would be the natural and proximate result of the cause of injury set out. *Goldsmith vs. Virgen*, 122 La. 834 (48 Sou. 279).

Paragraph 2.

Considering that the provisions of the act leave the quantum of damages largely to the discretion of the Court, and make the infringement of a trade-mark a criminal offense, we are of opinion that the Court in such cases is not restricted to the actual damages proven. *Cusimano & Co. vs. Olive Oil Importing Co.*, 114 La. 317 (38 Sou. 200).

For breach of contract through bad faith, even in the sense of ill-will, a contractor can recover no more than the damages which are the direct and immediate consequence of the breach. If, as an effect of the breach, he is deprived of the use of the only collateral he possesses on which to raise money for saving from the pursuit of his creditors a

business he is carrying on separately and independently of the contract, and his creditors seize and sell this business, the loss of this business is only a remote consequence of the breach of the contract, and cannot be recovered as damages for such breach. *Cusachs & Co. vs. Sewerage & Water Board*, 116 La. 510 (40 Sou. 855).

Where defendants, acting as real-estate brokers at the time they executed an option authorizing plaintiff's agent to purchase a large tract of land, acknowledged that defendants had no authority to sell a portion of the land contained in the tract, they were guilty of legal bad faith within Art. 1934. *Tulane Educational Fund Adm. vs. Baccich & De Montluzin*, 129 La. 469 (56 Sou. 379),

Paragraph 5.

A contract by a vendor of a mercantile business and good-will not to engage in a similar business in a specified place for three years, and stipulating for the payment by the obligor of a certain sum to the obligee in the event of a violation of the agreement, provides for "liquidated damages," and not for a penalty. *Goldman & Masur vs. Goldman*, 51 La. An. 761 (25 Sou. 555).

This contract contained the stipulation that he would pay \$15 for each day's delay. There was a delay of fifty-six days after the stipulated time. The owner caused some delay in the construction. Each day's delay caused by him is deducted from the fifty-six days, and judgment is rendered for the remainder of days. *Hebert vs. Weil*, 115 La. 425 (39 Sou. 389).

Refer to Arts. 1943, 2120, 2125, 2127, 2315, 3012.

Art. 1935.

Where, however, the future contract is to be a sale or promise of sale, and the deferred payments on the price are to bear interest, and the rate of interest is not fixed, the contract is null for want of a fixed price. The interest is a component part of the price; and, unless its rate is fixed, the price is not fixed. The fixing of this interest must be a matter of convention; hence, the provisions of the Code fixing the rate of legal interest can have no application to

such a case. *Kaplan vs. Whitwirth*, 116 La. 338 (40 Sou. 723).

Refer to Arts. 1938, 1940, 2439, 2924.

Art. 1937.

The note, which has been paid except interest, leaving for decision a question of interest only, stipulated for interest at the rate of six per cent. It is silent as to when the interest began to run. The contract with which it was identified stated: "All deferred payments bear interest at six per cent. per annum." Another part of the contract contains the following stipulation: "Bearing interest at six per cent. per annum." Deferred is used in the sense of "put-off" credit, and unavoidably gives rise to an inference of interest on credit portions of the purchase price from the date that time was given for payment of the price. After consulting the note and contract, they together evidence interest from date, and not from maturity. *Goss Printing Press Co. vs. Daily States Pub. Co.*, 109 La. 760 (33 Sou. 760).

Refer to Art. 1938.

Art. 1938. See Art. 1937, 109 La. 760; Art. 1935, 116 La. 346.

A stipulation to pay interest, without stating the rate, in a certain event, from the date of a loan, fixes the time of maturity. In such case the debt bears the legal rate of interest from the date of the loan when the debt became due by agreement of the parties. *In re Immanuel Presb. Church*, 112 La. 349 (36 Sou. 408).

Art. 1940. See Art. 1935, 116 La. 346.

Art. 1943. See Art. 1934, 106 La. 16, and 122 La. 834.

Art. 1945. See Art. 2478, 120 La. 837; Arts. 2047 and 2452, 107 La. 702.

Where, by the unambiguous terms of a contract, the rights of a party in a particular respect are to be governed by a specified condition, with reference to which loan he is called on to regulate his conduct, he cannot, at the option of the other contracting party, be affected by another and different condition, to which he has never assented, even

though, if it had been so agreed, the one condition might have served the purpose of the other. *Sigur vs. Burguieres' Executors*, 111 La. 1078 (36 Sou. 134).

A contract for the sale of standing timber which provides that the purchaser may enter on the property described of the vendor to cut and remove cypress trees, and to construct and use canals over the vendor's property for removing "said cypress trees from said property," authorizes the purchaser to take the cypress timber on the land of the vendor and remove the same by canals constructed on the land of the vendor; but the purchaser does not acquire thereby a right to transport through such canals timber from other lands. *Destrampe vs. La. Cypress Co.*, 130 La. ____.

Art. 1946.

Laws granting exemption from taxation must be strictly construed; and so the operation of an oil well cannot be held to be within the exemption granted to those engaged in mining operations. *J. M. Guffey Petroleum Co. vs. Murrah*, 127 La. 467 (53 Sou. 705).

Art. 1948. See *Gooden vs. Police Jury*, 122 La. 774.

Art. 1950. See **Art. 1926, 117 La. 289.**

Art. 1951. See **Art. 1926, 117 La. 289.**

When a policy of insurance is susceptible of two interpretations, that interpretation which is most favorable to the insured should be adopted. (*Mass. Ben. Assn. vs. Robinson*, 104 Ga. 256 [42 L. R. A. 272].) *Mutual Life Ins. Co. vs. New*, 125 La. 41 (51 Sou. 61).

Art. 1954. See **Art. 662, 51 La. An. 220.**

Art. 1955. See *Gooden vs. Police Jury*, 122 La. 774.

Art. 1956. See *Succession of Bidwell*, 51 La. An. 1986.

Art. 1957.

What is doubtful in an agreement is to be interpreted against him who has contracted the obligation. A sale with the right of redemption is none the less a real sale. After the lapse of the redemptory period without the exercise of the equity of redemption, a conveyance is as complete and

absolute as though the right had not been reserved. This case involves the interpretation of an explanatory agreement, or counter-letter, as affecting or controlling a contemporaneous act of sale. *Harper et al. vs. Citizens' Bank of Louisiana et al.*, 51 La. An. 511 (25 Sou. 466).

Art. 1958. See *Gooden vs. Police Jury*, 122 La. 775.

Art. 1959.

A clause in the contract reciting that "purchaser assumes all risk" held to mean all usual, known, ordinary, foreseen risks that may attend the inception, growth, development and maturity of the orange crop; not extraordinary or unforeseen risks, like the utter destruction of the entire grove of trees. *Losecco vs. Gregory*, 108 La. 663 (32 Sou. 985). [Reversed on rehearing.]

Where, in granting a charter to a railroad, the Legislature enjoins that the railroad shall preserve any street it may cross, so as not to impair its usefulness, the injunction will be understood as having reference to streets already in existence, and not as including any and all streets that might be established in the future by individuals or municipalities. *State vs. Morgan's L. & T. R. & S. S. Co.*, 111 La. 120 (35 Sou. 482).

Art. 1961. See **Art. 1764**, 111 La. 275.

Art. 1964. See **Art. 662**, 51 La. An. 220; **Art. 1933** 123 La. 309.

Where the right of way has been secured by an expropriation, the duty of the railroad to install cattleguards and crossings results, not from contract, but from law. *State vs. Colo. Southern, N. O. & P. Ry. Co.*, 120 La. 9 (44 Sou. 905).

Refer to Art. 1965.

Art. 1965. See **Art. 1683**, 105 La. 602; **Art. 1933**, 123 La. 309; **Art. 1964**, 120 La. 14.

Art. 1868. See **Art. 1790**, 51 La. An. 1669.

Art. 1969. See **Art. 2315**, 111 La. 771.

With us, the property of the debtor is the common pledge of his creditors; and any arrangement, whether

through the machinery of the Court or otherwise, whereby the debtor unites with one creditor to give such creditor an advantage over the others, is in violation of the prohibition of the law, and will not be permitted to stand. *Minge & Co. vs. Barbre*, 51 La. An. 1290 (26 Sou. 180).

Refer to Arts. 1970, 1977, 1983, 1984, 2053.

Art. 1970. See Art. 1969, 51 La. An. 1290.

Where real estate which is mortgaged is included in that included in a *cessio bonorum*, the mortgage creditor is authorized, under Act 15, p. 12, of 1894, to enforce his mortgage by executory process contradictorily with the syndic of the insolvency. Where at the time of the *cessio bonorum* the mortgage is properly inscribed, there is no necessity for reinscription under Art. 3369. The jurisprudence on that subject was not altered by the enactment of Act No. 15, p. 12, of 1894. *Trezevant vs. Levy's Heirs*, 114 La. 867 (38 Sou. 591).

Judgment creditors of a deceased debtor have a right of action to annul any contract of their debtor made in fraud of their rights. The right of the succession representative to sue to annul fraudulent or illegal contracts is not exclusive. A mortgage given to secure an actual loan of money may be fraudulent as to creditors if made with the common intent to screen the property of the insolvent debtor from the pursuit of his creditors. *Bank of Berwick vs. George Vinson Shingle & Mfg. Co.*, 124 La. 1003 (50 Sou. 823).

While the Courts of Louisiana may not have power by reason of their jurisdiction over the parties to a contract of sale of lands in Texas to directly annul such conveyance as in fraud of creditors, still such Courts have the power to decree such contract as made in fraud of creditors, and to coerce the purchaser to surrender the deed for cancellation, or compel him to reconvey the property, or restrain him from availing himself of such fraudulent title. *Kinder vs. Scharff*, 125 La. 594 (51 Sou. 654).

Refer to Arts. 1977, 2178, 3369.

Art 1972. See Art. 1481; and the following:

The cumulated suits may be treated and considered as a revocatory action brought under the provisions of Art. 1972 of the Revised Civil Code; it having been brought by

an individual creditor for the liquidation of her demand by a personal judgment against her debtor and against the two parties to the alleged fraudulent contract. *Simpson vs. Normand et al.*, 51 La. An. 1357 (26 Sou. 266).

Where the existence of a legal judgment at the time of the bringing of a certain character of suit is an essential basis for the bringing of such suit, the defendant is entitled to urge by way of exception the absolute nullity of the judgment claimed to exist. It is a well-settled rule of jurisprudence that the absolute nullity of a judgment may be invoked before the tribunal which rendered it when attempt is made to enforce it by any person whose interest may be affected by the judgment. *Andrews vs. Sheehy*, 122 La. 464 (47 Sou. 771).

Art. 1977. See *Hewett vs. Buvens*, 51 La. An. 327; **Art. 1969**, 51 La. An. 1290; **Art. 1790**, 51 La. An. 1663; **Art. 1819**, 109 La. 1049; **Art. 1970**, 125 La. 599.

The effect of the judgment obtained by a creditor of inferior rank setting aside as "simulated" a prior special mortgage appearing on the records is not to advance the party obtaining this judgment to the place which the special mortgage would have occupied had it been valid. The effect is to throw forward all parties, but in their regular order of registry. *Stubbs vs. Lee*, 105 La. 643 (30 Sou. 169).

Refer to Art. 1933.

Art. 1978. See **Art. 1790**, 51 La. An. 1669.

Art. 1979.

The law protects third persons only when they contract in good faith or in the usual course of business with the insolvent debtor. (Arts. 1979, 1986.) *Bank of Berwick vs. George Vinson Shingle & Mfg. Co.*, 124 La. 1004 (50 Sou. 823).

Refer to Arts. 1982, 1986.

Art. 1980. See **Art. 1790**, 51 La. An. 1569.

Art. 1981.

A purchaser in good faith from the owner of record is protected against an action in declaration of simulation

brought by the forced heirs of the vendor of such owner of record. *Vital vs. Andrus*, 121 La. 221 (46 Sou. 217).

Art. 1982. See Art. 1819, 109 La. 1048; Art. 1979, 124 La. 1003.

Art. 1983. See Art. 1969, 51 La. An. 1290.

An intent to give an unfair preference to one or more creditors is one of the statutory grounds for an attachment. Such a preference is a constructive fraud, and is prohibited, whether operated through the machinery of the Courts or otherwise. There is an unfair preference where the creditor knew, or had good reasons to know, that the debtor was insolvent, and the transaction gives the creditor any advantage over other creditors. *Bank of Patterson vs. Urban Co.*, 114 La. 788 (38 Sou. 561).

Refer to Art. 1984.

Art. 1984. See Art. 1969, 51 La. An. 1290; Art. 1983, 114 La. 793.

Act No. 94, p. 137, of 1896, imposing a penalty of fine and imprisonment for "willfully and knowingly purchasing in block goods, etc., unpaid for by the seller, without exacting from said seller a written statement, sworn to, showing that said goods, etc., have been paid for," has no application to the case of a wife who receives such goods, etc., by *dation en paiement* from her husband in restitution of her paraphernal property received and alienated by him. *Compton vs. Vietlien & Jacobs*, 118 La. 360 (42 Sou. 964).

Art. 1986. See Art. 1979, 124 La. 1004.

An agreement is valid by which a debtor transfers to his creditor a credit which is to mature at some future time in satisfaction of a debt not yet mature, or even not yet in existence, but which will mature or be in existence and payable by the time the transfer of credit itself matures and is payable; as in such case the agreement goes into immediate operation for that part of the debt already in existence, and it goes into operation for that part of the debt to be thereafter created as the latter debt springs into existence. *Cox vs. First National Bank*, 126 La. 89 (52 Sou. 227).

Refer to Art. 2642.

Art. 1987.

The revocatory action to set aside a pledge of mortgage notes may be brought in the court within whose jurisdiction the pledgor and the mortgaged property are found, though the pledgee resides in another State and keeps the notes in such other State. *Meyer vs. Moss*, 110 La. 132 (34 Sou. 332).

The prescription of such revocatory action is one year, and is not suspended by the principle of "*contra non valentem agere non currit praescription*." *Meyer vs. Moss*, 110 La. 132 (34 Sou. 332).

The prescription of one year, whether under C. C. 1987 or C. C. 1994, has no application to attacks upon simulated sales. *Lawson vs. McBride*, 121 La. 283 (47 Sou. 606).

Refer to Art. 1994.

Art. 1989. See Art. 1790, 51 La. An. 1669.

A receiver cannot sue himself; and, by our law, creditors may, for the satisfaction of their claims, exercise the rights of their debtors which the latter neglect or refuse to exercise. Hence, the creditor of an insolvent corporation in the hands of a receiver may bring suit for the corporation against the receiver, and also against associates of the receiver, in the matter out of which the liability of the receiver has arisen. *Dilzell Eng. & Con. Co. vs. Lehmann*, 120 La. 274 (45 Sou. 138).

Refer to Art. 1990.

Art. 1990. See Art. 1989, 120 La. 282; Art. 1021, 123 La. 831.**Art. 1991. See Art. 1860, 114 La. 642; Art. 1021, 114 La. 1003.**

The heir's right in this respect is not subject to seizure. The fact that the heir has filed suit to compel collation is not an executed right, rendering the suit subject to seizure. Suits may be seized, with the exception of those which are exclusively reserved to the person; for instance, a suit to compel collation. "The right is executed" or enforced only after judgment is rendered. *Champagne vs. Bloch Bros.*, 121 La. 193 (46 Sou. 207).

Art. 1992. See *Woodcock vs. Baldwin*, 51 La. An. 593.

The salary of the Clerk of the Sixth Recorder's Court is exempt from seizure. *Moll vs. Svisa*, 51 La. An. 290 (25 Sou. 141).

Art. 1993. See **Art. 1977, 105 La. 656.**

All parties in interest are parties to the suit. The action is founded on facts from which error or imposition is impliable. Lesion is not the revocatory action growing out of the acts of fraud on rights of creditors. *Belcher & Creswell vs. Johnson*, 114 La. 640 (38 Sou. 481).

Art. 1994. See **Art. 1790, 51 La. An. 1668; Art. 1987, 121 La. 283.**

A revocatory action to annul acts of a father in favor of his concubine and his bastard children in fraud of the rights of his forced heirs is barred in one year by Art. 1994 of the Civil Code, applicable to revocatory actions; whereas, an action in reduction of a donation made by a father in favor of his concubine and his bastard children in fraud of the rights of his forced heirs is barred in five years by Art. 3542 of the Civil Code. *Malbrough et al. vs. Roundtree et al.*, 128 La. 39 (54 Sou. 463).

Refer to Arts. 3182, 3542.

Art. 1996. See **Art. 1763, 118 La. 450.****Art. 1997.** See **Art. 490, 111 La. 1023.****Art. 2000.**

A contract giving D the exclusive right to drill in defendant's land with a view of finding commercial substances, and, in case of success, within ninety days thereafter, to pay defendant \$100 per arpent for a conveyance of the land, did not impose a personal obligation on D within Art. 2000 of the Civil Code; and, hence, the contract was assignable. *Anse La Butte Oil & Mineral Co. vs. Babb*, 122 La. 415 (47 Sou. 754).

Art. 2007.

A State Court can only sell the right of the shipowner subject to the maritime liens; and, where the purchaser at a receivership sale paid, over and above his bid, a certain sum of money to lien claimants who had filed a libel against the

vessel in a court of admiralty: *Held*, that the insolvent estate had no ownership or equity in the money so paid and received, and that the lien claimants, who were also creditors of the insolvent, could not be compelled to account for the same in the receivership proceedings. *In re Red River Line*, 115 La. 868 (40 Sou. 250).

Art. 2012. See Art. 490, 111 La. 1024.

Art. 2013. See Art. 1764, 111 La. 249; Art. 1338, 51 La. An. 1121.

It is no unusual thing for persons to mortgage their property by way of real security to secure the debts of third persons without coming under any personal obligations themselves. (C. C. 3295, 3296, 2112, 2013, 2019.) *Randolph vs. Stark*, 51 La. An. 1127 (26 Sou. 59).

Where plaintiff declares upon an instrument bearing across its face the words "It is hereby agreed that, in case the H. R. & S. Ry. is not completed to F within two years and to R within three years, this contract is null and void," that stipulation binds him, and the agreement is null and void if that road is not constructed as provided for. It does not suffice that some other road may have been built between the two points. *Union Saw Mill Co. vs. Lake Lbr. Co.*, 120 La. 106 (44 Sou. 1000).

Refer to Arts. 2019, 2038, 2047, 2112, 3295, 3296.

Art. 2015. See Art. 496, 107 La. 680; Art. 501, 113 La. 579.

Art. 2019. See Art. 2013, 51 La. An. 1127.

Art. 2021. See Arts. 490 and 1343, 116 La. 8.

A clause in a contract evidencing the grant of aid to a railway company, which is to construct a line on the east side of a river, that the company shall operate towboats with convenient barges at points on the river, so as to furnish transportation to freight, and to operate the boats to the end of the lower boundary line of the parish granting the aid, means that the railway company should run boats, etc., when necessary, in seasons of low water, up and down the river front of the parish, making easy and continuous connection with the railroad for people living on the west bank of the river. The obligation of the railway company

in this regard is not fulfilled by a contract with a boat already in the river to receive and transport such fruit and produce as may be offered for shipment where such boat makes fortnightly trips in that section. *Atkins et al. vs. Railway Co.*, 106 La. 574 (31 Sou. 166).

A so-called conditional sale, or sale by which the vendee is to become at once unconditionally bound for the price, and the vendor is to continue to be the owner of the property until the price is paid, is not possible under the laws of this State. *Barber Asphalt Paving Co. vs. St. Louis Cypress Co.*, 121 La. 152 (46 Sou. 193).

Refer to Arts. 2026, 2028, 2037, 2043, 2044, 2045, 2049, 2439, 2456, 2462.

Art. 2022. See Art. 202, 110 La. 765.

Art. 2025. See Arts. 490 and 1343, 116 La. 8; Riley vs. Union Saw Mill Co., 122 La. 876.

Art. 2026. See Art. 2021, 106 La. 574.

Art. 2028. See Art. 2021, 106 La. 574; Arts. 490 and 1343, 116 La. 8; Art. 1764, 122 La. 101.

Art. 2031. See Art. 1853, 118 La. 43.

Art. 2034. See Art. 1764, 115 La. 14, 122 La. 101; Art. 1926, 117 La. 278; Kent vs. Davis Bros. Lbr. Co., 122 La. 1057.

A executes a mortgage in favor of B to secure the payment of six notes of \$500 each. He delivers two of the notes to B and retains the four others in his own possession. Some time after he executes a mortgage in favor of C. He cannot, after he has executed this mortgage in favor of C, place the four notes in circulation to the prejudice of C's mortgage. This would be giving effect to a potestative condition in a manner the law never contemplated as possible. *Walmsley vs. Resweder*, 105 La. 532 (30 Sou. 5).

In an oil and gas lease the obligation of the lessee to complete one well within one year will be held to be purely potestative, and as such to entail the nullity of the contract, where he at the same time reserves to himself the right to retire from the contract at any time on paying two dollars; and this notwithstanding that the consideration of the con-

tract is stated to be one dollar cash in hand paid. *Murray vs. Barnhardt*, 117 La. 1023 (42 Sou. 489).

Article 2035 limits the previous section to such conditions as make the obligation depend solely on the exercise of the obligor's will, excluding conditions that the obligor shall do or refrain from doing a certain act. *Held*, that a contract by which plaintiff's assignor was to purchase the land in controversy in case of success in finding commercial substances therein was not void because the assignor might prevent such success by abstaining from drilling on any of the land. *Anse la Butte Oil & Mineral Co. vs. Babb*, 122 La. 417 (47 Sou. 754).

Where a party to a contract has obtained all the benefits he intended to obtain from such contract, he cannot subsequently be heard to urge that the contract is void because it contains a potestative condition, and thus defeat the rights of the party who has performed his part of the contract. A contract must be construed as a whole; and under this rule the contract in issue does not contain a potestative condition. *Busch-Everett Co. vs. Vivian Oil Co.*, 128 La. 887 (55 Sou. 564).

Refer to Arts. 2034, 2464.

Art. 2035. See Art. 1764, 115 La. 129; Art. 1926, 117 La. 278; Art. 2034, 122 La. 417.

Art. 2037. See Art. 2021, 106 La. 574; Art. 1926, 117 La. 278.

Contract was entered into between a seller of oil and a corporation owning a plantation and sugar refinery, whereby the former agreed to sell the latter twenty thousand barrels of oil at a fixed price, with the privilege of fifteen thousand more. The privilege granted was to enable the planter to call, if necessary, for more oil to enable it to take off its crop. The seller furnished all the oil needed for that purpose, but the planter insisted upon its furnishing the full fifteen thousand barrels, and on its refusal to do so brought suit for damages. *Held*, that no damages could be recovered. The liability for damages for breach of contract extends to the loss which the other has really suffered, and to the gain of which he has been deprived, but not necessarily to the latter. In this case the damages would be lim-

ited to the loss suffered. *Adeline Sugar Factory Co. vs. Evangeline Oil Co.*, 121 La. 961 (46 Sou. 985).

Art. 2038. See Art. 2113, 120 La. 116; Art. 1931, 51 La. An. 1488.

The instrument on which defendant as transferee bases his right was not signed by the party named as the party of the second part, nor did he take the obligation of constructing the H. R. & S. Railway through that section within two years. It was stipulated that, if such road should not be completed within two years from the date of the instrument, the agreement should be null and void. A road was not completed within the time fixed; and, if any rights had accrued prior to the time fixed in favor of anyone under the license granted to cut and remove timber, to be paid for when cut and removed, that right ended when the two years expired. The stipulation on that subject was the controlling stipulation of the whole act; all the other clauses and stipulations in the instrument were held in check and governed by it. *W. B. Thompson & Co. vs. Union Saw Mill Co.*, 121 La. 318 (46 Sou. 341).

The proposition that when the holder of a claim has tried for several years to get some adjustment of it, and has finally sold it to another, who brings suit, a stipulation in a proposed agreement for arbitration, or compromise, fixing the time within which the claim is to be settled, is not the essence of such proposed agreement, is untenable. Reason and authority alike are against it. *Saint vs. Martel*, 127 La. 74 (53 Sou. 432).

Refer to Arts. 2039, 2047.

Art. 2039. See Art. 2038, 121 La. 338.

Art. 2040.

The parties having agreed to join their efforts for controlling a company, and for having plaintiff chosen as secretary and local manager, defendant having thereafter entered into a contract with another party by which the same position was to be secured for such other party: *Held*, plaintiff has a cause of action for breach of contract. *Lloyd vs. Dickson*, 116 La. 90 (40 Sou. 542).

The notice of the withdrawal of land from the market was a recognition of the pre-existing agency of the plain-

tiffs. This withdrawal was after the plaintiff and the prospective buyer had started to meet the defendant at N. There was no necessity for putting defendant in default. He had himself put an end to the agency, and had placed it out of his power to carry out the promised sale. He had withdrawn from the prospective purchaser an opportunity to show his good faith and ability to purchase. *Lucket Land & Imp. Co. vs. Brown*, 118 La. 944 (43 Sou. 628).

Refer to Arts. 2988, 2989, 3016, 3027.

Art. 2041. See Arts. 490 and 1343, 116 La. 8; Art. 1764, 122 La. 101; *Westmore vs. Harz*, 111 La. 308.

A policy of life insurance issued to a married man during the existence of the community, and made payable to his executors, administrators and assigns, falls into the community, and not his separate estate, on the dissolution of the former by his death. *Succession of Buddig*, 108 La. 406 (32 Sou. 361).

A sale made on the condition that it shall be found that the vendor was owner of the property cannot serve as a basis for prescription if it was found that the vendor was not the owner. The accomplishment of the condition retroacts to the date of the sale, placing matters in the same situation in which they would have been if the sale had not been made; and, hence, any possession by the vendee is one without a title. *Albert Hanson Lbr. Co. vs. Angelloz*, 118 La. 861 (43 Sou. 529).

A promise of sale amounts to a sale in the sense that it gives the purchaser the right to demand a specific performance of the obligation to transfer and deliver the property. Where the conditions have been performed, the legal title passes as of date of the original agreement. *Lehman vs. Rice*, 118 La. 975 (43 Sou. 639).

Refer to Art. 2045.

Art. 2042.

An order of Court appointing a receiver to a corporation, "with power to administer its affairs for the best interest of all parties," does not confer upon the receiver the authority and power to continue the operations of the company and incur liabilities as a going concern. Authority for such purpose must be given in express and precise lan-

guage. *Villere vs. N. O. Pure Milk Co.*, 122 La. 717 (48 Sou. 162).

Art. 2043. See *Machine Co. vs. Newman*, 107 La. 709;
Art. 2021, 121 La. 162; *Kent vs. Davis Bros. Lbr. Co.*, 122 La. 1058.

Art. 2044. See **Art. 2021, 121 La. 165.**

Art. 2045. See **Art. 2041, 118 La. 863.**

Rescission for the non-payment of the purchase price may be enforced if the parties to the sale can be placed in the same condition as they were as though the obligation had not existed. The test in a suit between the parties to a sale is the return to the purchaser of that portion of the price he has paid (if any), and his complete discharge as to the remainder—the unpaid portion of the price. *Ragsdale et al. vs. Ragsdale et al.*, 105 La. 405 (29 Sou. 906).

The contract for the sale of one entire crop of molasses is indivisible, and, if broken, cannot be dissolved for part, but must be set aside as a whole, or not at all. If, therefore, the vendor diverts part of the crop, this gives rise to an action in damages, but does not release the purchaser from the obligations of the contract. *Barrow & LeBlanc vs. Penick & Ford*, 110 La. 572 (34 Sou. 691). [Overruled.]

The right of redemption is a dissolving condition, and the effect of its exercise is to dissolve the sale, placing matters in the same situation as if the sale had not taken place; and, of course, a sale that has never taken place cannot create a new title or begin a new possession. *Succesion of Zebriska*, 119 La. 1092 (44 Sou. 893).

The city resists the attempt of the plaintiff to recover from it the amounts he failed to recover from the particular front proprietors, who made good their defense that their properties were not liable to contribute part of the expense of the work, on the ground that he expressly consented and agreed that "the city should not be held responsible for any bills should any of them be not paid," and that the city should not be responsible for any part of the cost of the work. Plaintiff denies that the clause in question covers, or was intended to cover, a case where certificates or bills were not paid, for the reason that they had no legal ex-

istence; and so it is decided. *Brunnig vs. City of New Orleans*, 122 La. 338 (47 Sou. 624).

The resolutory condition in a contract of sale cannot be enforced, in the absence of proof of such fraud as would vitiate everything, at the suit of a litigant who represents only part of the interest of the vendor, or where, by their acts, the parties have made it impossible to restore matters to the condition existing prior to the sale. *Miguez vs. Delcambre*, 125 La. 176 (51 Sou. 108).

Refer to Arts. 2046, 2047, 2109.

Art. 2046. See Art. 2021, 106 La. 574; Art. 2045, 122 La. 326; Art. 1049, 114 La. 67; Art. 1933, 117 La. 1034, and 119 La. 832; I. C. Ry. vs. St. L. & S. F. Ry., 124 La. 74.

A contract for two cotton compresses was made under a fixed limit as to the time of completion. One was completed, delivered and accepted within the time. The other was not; but the contractor was not put in default, no demand was made for the dissolution of the contract, and the contractor was permitted to proceed with its execution. Thereafter the other party could not arbitrarily declare the cancellation of the contract and decline to receive the press. *Held*, the press should have been accepted and the contractor proceeded against for damages, if any, caused by the delay. *De la Vergne Co. vs. N. O. & W. Ry. Co.*, 51 La. An. 1733 (26 Sou. 455).

The plaintiff company purchased from S. T. B. and H. K. its assets, business and good-will. The individual members of the firm each bound himself not to engage in competitive business in New Orleans during a certain period. After the sale H. K. was taken into the employ of the purchasing company, but was discharged. He thereupon entered into competitive business. The plaintiff obtained an injunction. Defendant concededly carrying on a competitive business in violation of the obligation which he had assumed, plaintiff had the right to an injunction, and defendant had no legal right to tender, for the purpose of having the injunction dissolved, issues as to whether he had been properly or improperly discharged, and that the resulting effect would be, *ipso facto*, to absolve him from his obligation not to engage in business. Those issues would have

to be tendered and adjudicated in other proceedings. *Eugene Dietzgen Co. vs. Kokosky*, 113 La. 450 (37 Sou. 24).

Generally speaking, no doubt, in actions to rescind contracts of sale for the non-payment of the price, the plaintiff must tender so much of the price as may have been paid; but the rule is no broader than the reason upon which it is founded; and, where it seems likely that, upon a final adjustment, there will be nothing due the defendant, such tender need not be made. *Succession of Delaneuville vs. Duhe*, 114 La. 62 (38 Sou. 20).

Refer to Arts. 2047, 2749.

Art. 2047. See Art. 2038, 121 La. 336, and 127 La. 98;

Art. 2013, 120 La. 113; Art. 1933, 119 La. 832;

Art. 2046, 113 La. 455, and 51 La. An. 1742;

Art. 2045, 110 La. 273.

A contractor who has unadvisedly refused to perform his contract may, while the situation of things is unchanged, retract the refusal, and go on with the contract; and is not cut off from so doing by the service upon him of a notice to the effect that the contractoree will hold such refusal to be a default, and will sue to dissolve the contract. *Perkins vs. Fraser & Nason*, 107 La. 390 (31 Sou. 773).

Where all the essential elements and conditions for an absolute sale are present in a contract between parties, the effects flowing legally from that particular contract follow whether the parties foresaw or intended them or not, and though they may refer to the contract as an agreement to sell or as a conditional sale. *Machine Co. vs. Newman*, 107 La. 702 (32 Sou. 38).

In a suit to rescind a contract to do the Court may, according to the circumstances of the case, grant the obligor further time in which to perform. Further time is refused in this case because, in a mineral contract, time is always more or less of the essence, and because the obligor offers no excuse for having allowed four years to elapse without any effort on his part to fulfill his contract. *Murray vs. Barnhardt*, 117 La. 1024 (42 Sou. 489).

The Code Napoleon, like the Civil Code, does not provide that the Judge may grant a delay to the donee to perform conditions; but the Courts and the jurists have applied to donations the same rule applicable to commutative contracts. Hence, whether the instrument sued on be consid-

ered a donation or an onerous contract, the Judge has no power to grant delays, and the donee no right to perform or pay, after the institution of the suit. *Baker vs. Baker*, 125 La. 973 (52 Sou. 115).

Refer to Art. 2471.

Art. 2048. See *Horner vs. vs. McDonald*, 51 La. An. 415; *Riley vs. Union Saw Mill Co.*, 122 La. 877.

Art. 2050.

A stipulation for a fixed price means cash, and not terms of credit. *Succession of Whitting*, 121 La. 502 (46 Sou. 606).

Art. 2052. See Art. 1890, 52 La. An. 415.

The exceptional and extraordinary privilege granted to landlords to sue for rents not due when the tenant abandons the house or farm leased has no application to a suit by a lessor of patented machines to recover future royalties extending during a period of fourteen years. *American Machinery & Construction Co. vs. Stewart & Haas*, 115 La. 189 (38 Sou. 960).

Refer to Art. 2710.

Art. 2053. See Art. 1969, 51 La. An. 1290; Art. 1890, 52 La. An. 415.

Where a note payable on demand at the payee bank is secured by a pledge of collateral which the bank is authorized to sell upon the failure of the maker to respond to a call for additional security and after demand for payment, the bank has no right to sell the collateral unless such call and demand have first been made. *Smith vs. Shippers' Oil Co.*, 120 La. 641 (45 Sou. 533).

Refer to Art. 3165.

Art. 2054. See Art. 1890, 52 La. An. 415.

The company having stopped operations, and never having declared any dividends, the plaintiff sued to compel defendant to pay the installments or dividends for ten years, on the ground that, by going out of business, the company caused defendant's obligation to pay ten per cent. interest per annum for ten years, if the company did not pay it, to mature. The Court holds that one installment is due

as claimed, but that the other installments are not exigible, the time stipulated not having elapsed. The principal obligor continues to enjoy the time during the term agreed upon. *Hawks vs. Bright*, 51 La. An. 79 (24 Sou. 615).

Art. 2056.

A seller of lumber for delivery within a specified time has until the last day of the period to fulfill the contract; and, where he does not make delivery on the last day, the buyer may on the following day buy in the open market at the place of delivery and charge the seller with the cost, less what would have been the cost under the contract. *Hafner Mfg. Co. vs. Lieber Lbr. & Shingle Co.*, 127 La. 350 (53 Sou. 646).

Art. 2057. See Art. 1890, 52 La. An. 415; Murray vs. Barnhardt, 117 La. 1035.

Art. 2061. See Art. 1890, 52 La. An. 415.

Art. 2067.

Not exploring it himself for oil and gas, and not allowing anyone else to do so, but that he should be bound to complete a well within one year, the obligation to pay four dollars quarterly will be held to be a mere penal clause, and not an alternative obligation; and the making of said payments will be held not to be a fulfillment of the principal obligation, in whole or in part, but merely the payment of liquidated damages. *Murray vs. Barnhardt*, 117 La. 1024 (42 Sou. 489).

Refer to Arts. 2117, 2118, 2122, 2125.

Art. 2077.

A judgment having been rendered against several defendants, from which some of them appeal suspensively and others instituted an action of nullity: *Held*, that, the judgment annulling the decree having been rendered by this Court, it should postpone action on the appeal from the judgment until further proceedings are deemed necessary and appropriate. Notwithstanding a subcontract for the transportation of the United States mail stipulates a fixed sum as liquidated damages for failure to perform services required, same must be sued upon specifically and in turn; otherwise, it cannot be made a basis of a judgment in dam-

ages. *Woodlief vs. Logan et al.*, 51 La. An. 1935 (46 Sou. 627).

Refer to Arts. 2078, 2084.

Art. 2078. *See Art. 2077.*

Art. 2080. *See Art. 1890, 52 La. An. 407.*

Art. 2084. *See Art. 2077, 51 La. An. 1958.*

Art. 2090. *See Art. 1890, 52 La. An. 406.*

Art. 2093. *See Art. 1890, 52 La. An. 407.*

A joint sale of land can only give rise to a joint obligation of warranty, the warranty necessarily following the nature of the sale; especially as under the express provision of Art. 2093 of the Civil Code an obligation *in solido* is not presumed, but must be expressly stipulated. *Southon vs. Laws*, 127 La. 531 (53 Sou. 852).

Art. 2103.

One of two debtors *in solido*, on payment of a judgment against both, is subrogated to the rights of the judgment creditor against his co-defendant to the extent of his part and portion of the debt, including interest and costs. *Theus vs. Armistead*, 116 La. 795 (41 Sou. 915).

Refer to Arts. 2104, 2161.

Art. 2104. *See Art. 2103.*

Art. 2106.

Where a judgment has been rendered against co-defendants *in solido* who are equally at fault, they are liable *inter se* according to their interest in the subject-matter of the contract. *Smith Bros. & Co. vs. N. O. & N. E. Ry. Co.*, 109 La. 782 (33 Sou. 769).

Refer to Art. 2161.

Art. 2109. *See Art. 2045, 110 La. 573.*

The obligation to complete one well is indivisible in its nature, and, as a necessary consequence, the corresponding obligation to deliver the land is also indivisible; since, naturally, if the whole of one side of a contract be fulfilled, the

whole of the other side must likewise be fulfilled. *Murray vs. Barnhardt*, 117 La. 1027 (41 Sou. 437).

Art. 2112. See Arts 2013 and 1338, 51 La. An. 1127.

A mortgage is, in its nature, indivisible; and it prevails over all the immovables subject to it, and over each and every portion. (C. C. 2112, 3282.) *Varnado vs. W. B. Thompson & Co.*, 129 La. 15 (55 Sou. 693).

Refer to Art. 3282.

Art. 2116.

It developed that Mrs. Hunter could not make a good title because she owned only a half interest in the land, the other half belonging to her minor children. Williams thereupon sued for the penalty. The Court refused to enforce the penalty because it was legally impossible for Mrs. Hunter to comply with the agreement. *Jefferson Saw Mill Co. vs. Iowa & La. Land Co.*, 122 La. 993 (48 Sou. 428).

Art. 2117. See Art. 2067, 117 La. 1033.

A penal clause in a contract is considered by the law in the nature of compensation for the damages which the creditor sustains by the non-execution of the principal obligation. But the penalty being stipulated merely to enforce the performance of the principal obligation, it is not incurred, although the principal obligation be not performed, if there be a lawful excuse for its non-performance. *Wagner Co. vs. City of Monroe*, 52 La. An. 2132 (28 Sou. 229).

Refer to Arts. 2118, 2119, 2125.

Art. 2118. See Art. 2117, 52 La. An. 2139; Art. 2067, 117 La. 1033.

Art. 2120. See Art. 2117, 52 La. An. 2139; Art. 1933, 108 La. 655; Art. 1934, 115 La. 427.

Art. 2122. See Art. 2067, 117 La. 1033.

Art. 2125. See Art. 1934, 51 La. An. 771; Art. 2117, 52 La. An. 2139; Art. 2067, 117 La. 1033; Art. 1933, 126 La. 191.

Art. 2126. See Art. 1933, 126 La. 190.

Art. 2127. See Art. 1934, 51 La. An. 771; Art. 1933, 126 La. 191.

Art. 2130.

The modes of extinguishing obligations specified in Art. 2130 are not exclusive. *Perkins vs. Frazer & Nason*, 107 La. 391 (31 Sou. 773).

Art. 2131. See State vs. Laborde, 119 La. 406.

Art. 2132. See State vs. Laborde, 119 La. 406.

Art. 2133. See Art. 1757, 107 La. 224.

Anyone may, for the advantage of the owner of the property, act as his *negotiorum gestor*, and make payment of redemption money; this even without his knowledge. There is a difference between redemption under a conventional sale made with right of redemption reserved and a redemption under a tax adjudication. *State vs. Register of Conveyances*, 113 La. 93 (36 Sou. 900).

Article 242 of the Code of Practice declares that property of a debtor may be attached in the hands of third persons by his creditor in order to secure the payment of a debt, "whatever may be its nature," whether the amount be liquidated or not, provided the creditor praying for the attachment states expressly and positively the amount which he claims. As to the legal acceptation of the word "debt," see Art. 1756, 119 La. 392. *Morgan's L. & T. R. & S. S. Co. vs. Stewart*, 119 La. 392 (41 Sou. 138).

One who has possessed a tract of land as owner for a number of years is considered in law as provisional owner, with exclusive rights of entry and possession, and is entitled to redeem the land from a tax sale. Where land has been sold at a tax sale a tender of the price, with costs and penalties, made to the purchaser within the year following, will work a redemption of the property and wipe out the tax title. *Bentley vs. Cavalier*, 121 La. 60 (46 Sou. 101).

Refer to Arts. 2134, 3442, 3443, 3454, 3488.

Art. 2134. See Art. 2133, 113 La. 100, and 121 La. 60.

Art. 2138.

As to payment of the debt with the property of another, or a discharge of obligation by the payment of money

or the delivery of some of those things which are consumed in the use, and the creditor has used them, in such a case neither the money nor the things can be reclaimed, and the payment will be good. As relates to payment of the remainder in cash, the agents of plaintiff, as well as plaintiff, cannot be the cause of defendants losing the sum paid by them in good faith upon the bill of lading produced. *Loeb vs. Selig & Cromwell*, 120 La. 192 (45 Sou. 100).

Art. 2146.

But it is also true that, where a payment has been made to an attorney at law employed to sue for the amount, it will discharge the debtor. *Liquidators of Jos. David Co. vs. Berthelot Bros.*, 118 La. 383 (42 Sou. 971).

Art. 2149.

It is the duty of the Tax Collectors to proceed to the enforcement of delinquent taxes by sale of the real estate affected by the same when the time fixed by law for doing so is reached. The fact that it may be at that time in the possession of the Sheriff under a seizure is no obstacle to this being done. *Flower, King & Putman vs. Beasley*, 52 La. An. 2054 (28 Sou. 322).

Art. 2156.

Under a contract by a party to furnish another with hulls and cottonseed meal for feeding cattle, wherein the quality of the articles to be furnished is not declared, the vendor's obligation in respect thereto is governed by Art. 2156. *Commission Co. vs. Oil Co.*, 104 La. 664 (29 Sou. 265).

Refer to Art. 1640.

Art. 2160.

One who, without interest as creditor, co-debtor or heir, pays the mortgage note of another acquires no subrogation to the rights of the creditor unless it be expressed and made at the same time as the payment. He has a claim for reimbursement against the party for whose benefit the payment was made, but only as ordinary creditor. While Art. 2160 declares that a debtor borrowing a sum of money to pay his debts may, by a notarial act, subrogate the lender to the rights of the creditor, and that the subrogation takes place independently of the credit, it is controlled by Art. 2162, which provides that, in case of a subrogation made by the debtor, the creditor may exercise his right for what

remains due him in preference to the debtor's subrogee. *Hutchinson vs. Rice et al.*, 105 La. 474 (29 Sou. 898).

Article 2160 says of conventional subrogation: "It must be made at the same time as the payment." It simply means that the agreement of subrogation cannot be entered into after the payment. It does not mean that it cannot be entered into before the payment; as, where the agreement is that, in case the party pays the debt at any time in the future, he shall be subrogated to all the rights of the creditor. Where the distinct understanding is that the payment will be made only on the condition of subrogation, the mere sending of a check in payment of the debt, without anything further being said about subrogation, will operate the subrogation. *Cooper vs. Jennings Refining Co.*, 118 La. 181 (42 Sou. 766).

Refer to Art. 2161.

Art. 2161. See Art. 1338, 51 La. An. 1127; Art. 2160, 105 La. 477; Art. 2106, 109 La. 789; Art. 2103, 116 La. 800; Villere vs. N. O. Pure Milk Co., 122 La. 735.

Plaintiff, surety on the twelve months' bond, paid it, and sued defendant, co-surety, for one-half the amount so paid, alleging insolvency of the principal and other co-sureties. *Held*, equity and good conscience alike preclude his recovery. In law he must be held responsible both for failure to take timely action after he had paid the bond to protect it by means of the property, the purchase price of which, with the vendor's privilege, he retained, if represented, and for the situation now existing, rendering subrogation unavailing. *Moore vs. Drew*, 51 La. An. 740 (25 Sou. 402).

A legal subrogation to rights by payment is derived from the law, and not from the consent of the parties who receive payment. The fact that the creditor who has received the payment has written the word "Paid" or "Cancelled" upon the particular mortgage note for which he has received payment does not prevent legal subrogation taking place in favor of the person making the payment, if he be otherwise entitled to it. Other creditors cannot urge such fact in their own favor, and the mortgage remains

uncanceled upon the record. *Walmsley & Co., in Liquidation, Consolidated*, 107 La. 417 (31 Sou. 869).

Where two plantations held by A and B respectively are affected by a single first mortgage, and the titles show that, between the owners, A has assumed the debt, and has agreed that, in the event of B paying any part of it, he shall be subrogated to the rights of the creditor and mortgagee, neither A nor any creditor of his who was a party to the contract by which the titles were acquired, or who claims under a mortgage inscribed against his plantation, after the registry of those titles, can take anything realized from the sale under the first mortgage of the two plantations until B is reimbursed the amount contributed by his plantation to the satisfaction of said first mortgage, to which, to the extent and by virtue of such contribution, and *quoad* the parties mentioned become subrogated. *Blanchard vs. Naquin*, 116 La. 807 (41 Sou. 99).

When the holder of a note secured by the pledge of property belonging to the indorser sells such property in satisfaction of the debt due him, and realizes sufficient for the purpose, the note is paid, the indorser becomes subrogated to the rights of the holder, and the latter cannot lawfully put the note in circulation by indorsing it, without recourse or otherwise, to the purchaser of the pledged property. *Smith vs. Shippers' Oil Co.*, 120 La. 641 (45 Sou. 533).

A mortgage creditor who has paid taxes on the property hypothecated is subrogated by operation of law to the privilege of the taxing authorities. The debtor or his assigns may claim the homestead exemption of \$2,000 at any time before the proceeds of the judicial sale are paid out or distributed. *Abbot vs. Heald*, 128 La. 719 (55 Sou. 28).

Refer to Arts. 2163, 3061, 3282.

Art. 2162.

The wife became the owner of a separate interest in property owned by her husband (she was his creditor), and for that reason had the right to pay a debt against him and to legal subrogation, provided it did not come in conflict with the transferor's mortgage, who retained, under the rule which controls legal subrogation, all his rights on notes unpaid in his hands. *Walmsley & Co., in Liquidation, Consolidated*, 107 La. 417 (31 Sou. 869).

The purpose of the bond required of a Tax Collector is to secure the faithful performance of all his duties, including payment of all taxes collected; and, though the bond may be insufficient, the spirit and purpose of the contract—i. e., that the obligee shall be held harmless at least up to the amount of the bond—are unaffected by that circumstance; and, as subrogation is essentially an equity, it follows that the surety who pays the amount called for by such bond does not thereby become subrogated to the right of the creditor, to the prejudice of the balance due to the latter, and to such effect that the surety may recoup himself entirely and sustain no loss, whilst the creditor remains the loser in a matter with respect to which the bond was intended to protect him. *State vs. Perkins*, 114 La. 302 (38 Sou. 196).

Refer to Art. 2399.

Art. 2163. See **Art. 2161**, 51 La. An. 745.

Art. 2164. See *Beugnot vs. Tremoulet*, 106 La. 547.

This agent should be called upon to pay only the legal rate of interest (five per cent. per annum) upon the funds of the principal which came into his hands; and this according to the rule laid down in Art. 2164—that of partial payments. *Beugnot vs. Tremoulet*, 52 La. An. 462 (27 Sou. 107).

A person intrusted by the mother of a minor, living with her mother in Germany, with the interest and property of the minor in Louisiana, who deposits confusedly with his own the funds of the minor to his own account with the local banks, checking against the same at will, obtains a basis for credit therefrom, and is chargeable with interest thereon. Legally considered, he uses the money for his own purposes, though the amount checked out may have left on deposit an amount sufficient to cover the funds belonging to the minor. *Beugnot vs. Tremoulet*, 111 La. 1 (35 Sou. 362).

Refer to Art. 3015.

Art. 2166.

Where money and merchandise are drawn and received upon a running account, upon which there is a past-due balance, and upon which current entries are also being

made, to the credit of the party so drawing and receiving, the payments so made, in the absence of instructions from the debtor, will be imputed to the debt longest due—i. e., the balance due. *Sleet vs. Sleet*, 109 La. 302 (33 Sou. 322).

He further testified that all payments made by plaintiff were made "on account," and for every payment a receipt had been exacted, and that it was invariably made to read "on account." Defendant testified that the account of each month had been paid at the end of each month. Defendant produced a receipt which read "on account." *Held*, defendant has not proved his plea if payment, and the payments must be imputed to the oldest items on the account, and plaintiff can recover only for the goods sold during 1902. *Hoqueye vs. Henkel*, 115 La. 1066 (40 Sou. 460).

Art. 2167. See *Martin vs. Hibernia Bank & Trust Co.*
127 La. 305.

If a legal tender had been made of the true amount due as alleged, defendant owed no interest thereafter. *Frey vs. Fitzpatrick-Cromwell Co., Ltd.*, 108 La. 125 (32 Sou. 437).

In order to complete the tender, there was no necessity under the circumstances of consigning the amount tendered. The debtor need not tender other amounts he owes. In this instance the indebtedness which defendant claims should have been tendered is to be settled under the terms of the decree. The defendant was sufficiently placed *in mora*. The cash portion of the price was tendered, the notes representing the credit portion, which defendant refused to accept. *Murphy vs. Hussey*, 117 La. 391 (41 Sou. 692).

Refer to Arts. 2168, 2169.

Art. 2168. See Art. 2167, 108 La. 128.

Under Section 62, Act 96, of 1882, a Tax Collector was authorized to receive the redemption price of property sold for taxes only when the purchaser at the sale could not be found. This section has no application to a case where the purchaser was a resident of the parish in which a tax sale was made, and there is nothing to show that a tender in the usual form could not have been made to him. *Frisco Land Co., Ltd., vs. Nevins*, 129 La. 963 (57 Sou. 284).

Art. 2169. See Art. 2167, 108 La. 128.

Art. 2170.

The enactment of a general bankruptcy law by the United States suspends the operation of all State insolvent laws. This rule applies to the merger of respite proceedings into a cession of property, as provided by Art. 3098 of the Civil Code, when the creditors refuse to grant a respite. *Duffey vs. His Creditors*, 122 La. 600 (48 Sou. 120).

Refer to Arts. 2184, 3098.

Art. 2175.

An insolvent who makes a surrender of his property in insolvency surrenders it to his creditors for administration by them for their own use and benefit through the Court. Any interest which he might have in the property and in its administration is subordinated to the paramount rights of the creditors. He reserves no right, and the law accords him none, in the selection or choice of a syndic. Questions on that subject concern the creditors alone. *Conery vs. His Creditors*, 118 La. 161 (42 Sou. 760).

Refer to Arts. 2178, 2179, 2180, 2182.

Art. 2178. See Art. 1970, 114 La. 870; Art. 2175, 118 La. 167.**Art. 2179. See Art. 2175, 118 La. 167.****Art. 2180. See Art. 2175, 118 La. 167.****Art. 2182. See Art. 2175, 118 La. 167.****Art. 2184. See Art. 2170, 122 La. 601.**

The liquidator of a partnership or corporation which has been dissolved by the vote of the parties in interest and gone into liquidation is without authority to continue its business as a going concern, and will be held to strict responsibility for so doing. Where several parties carry on the business of a commercial partnership in the name of a limited corporation which has never had the capital required to give existence to such a corporation, its liquidator, who was one of the partners, has no grounds to complain of a judgment on final liquidation which does not extend his liability beyond that for which he would be legally liable as a partner. *In the Matter of Brown & Jenkins Co., Ltd., in Liquidation*, 106 La. 486 (31 Sou. 67).

Art. 2187.

Plaintiff sued upon a contract; defendant pleaded that the obligations of the contract had been extinguished by novation by reason of the creditors having received other notes signed by the debtor, together with other and new parties, payable at different dates, and at a higher rate of interest. *Held*, for reasons assigned (Arts. 2187, 2192), that the defense was not well founded. *Sucker State Drilling Co. vs. Henry Lower & Co.*, 114 La. 403 (38 Sou. 399). *Refer to Art. 2192.*

Art. 2192. See Art. 2187, 114 La. 404.**Art. 2203.**

This Court said that "it was well settled that compensation did not take place between partnership and individual debts under the operation of Arts. 2203 and 2204 of the Civil Code. So that A could not plead as an offset to the debt which he owed individually his claim against the firm of B & Co., although the plaintiff was liable solidarily for all of the debts due by the firm." The Court in arguing said: "The rule of law is that, during the existence of the partnership, the suit must be brought against the firm, and not against the individual partners." *Wolfe & Son vs. Pants Co., Ltd.*, 52 La. An. 1367 (27 Sou. 893). *Refer to Art. 2204.*

Art. 2204. See Art. 2203, 52 La. An. 1367.**Art. 2208.**

The failure of the hotel company to exact from its contractor the bond the law required, and to seasonably record its contract and bond in the Mortgage Office, forced upon it the legal assumption of these debts, which Frazer had contracted with Wiley and the Otis Company, and had failed to pay. Being thus liable therefor, and judicially compelled to pay the same, the hotel company may use the amount thereof as a set-off *pro tanto* as against the funds in hand still due Frazer on account of his connection with the construction of the hotel building. *Willey vs. St. Charles Hotel Co.*, 52 La. An. 1590 (28 Sou. 182).

Verbal expressions of the debtor indicative merely of his intention to make a legacy in favor of the creditor, but

not rising to the character of an agreement to postpone payment of the claim, do not suspend prescription. The two debts to be compensated may remain outstanding if such is the will of the parties. Compensation does not apply in this case. *Watson vs. Barber*, 105 La. 799 (30 Sou. 127).

Refer to Art. 2278.

Art. 2209.

We think it clear that the demand on a penal clause, unliquidated and undisputed, cannot be pleaded in compensation against a promissory note. It will be seen that it is indirectly held that the demand in the penal clause in this contract was unliquidated. If unliquidated, why? Because it was subject to reduction, to modification, in the case of a partial execution of the principal obligation. *Goldman & Masur vs. Goldman*, 51 La. An. 767 (25 Sou. 555).

There is no conflict between the plea of failure of consideration and the plea of compensation in the alternative, as against the claim sued on, to the extent that it may be found that the consideration has not failed. Failure of consideration may extinguish an obligation, and is a ground for enjoining executory process Under Art. 793 of the Code of Practice. *Phillips et al. vs. Adams Machine Co.*, 52 La. An. 442 (27 Sou. 65).

The warehouseman has a right to hold possession of the goods stored with him until the amount due him for storage is paid. The amount due for storage on goods cannot be compensated by an unliquidated claim for damages suffered by the goods. *Marks & Rittner vs. N. O. Cold Storage Co.*, 107 La. 172 (31 Sou. 671).

The damages claimed by him as an offset had not been liquidated. He could not plead an unliquidated claim in compensation of an amount which he owed to his creditor, whose claim was garnished. *Monroe Grocery Co. vs. J. A. Perdue & Co.*, 123 La. 376 (48 Sou. 1002).

Refer to Art. 2215.

Art. 2211. See *Willey vs. St. Charles Hotel Co.*, 52 La. An. 1591.

Art. 2214. See *Wells vs. Blackman*, 121 La. 1224.

Art. 2215. See **Art. 2209**, 123 La. 384.

Art. 2217.

Before the State taxes for a given year became due and demandable a lot of ground upon which the same had been assessed passed out of the hands of private ownership into the hands of public ownership. *Held*, the moment the public ownership attached developing liability to taxation was arrested. *Gachet vs. City of New Orleans*, 52 La. An. 813 (27 Sou. 348).

Art. 2219. See Art. 1933, 108 La. 655.

Art. 2221. See Art. 1295, 118 La. 303 (Arts. 3543 and 3542).

The proof disclosing that a married woman conveyed real estate to her husband through the interposition of a third person, and without having received any consideration therefor, the transaction is fraudulent simulation and violative of a prohibitory provision of the Code. The husband having died possessed of such title, his heirs have an interest therein which is subject to a judicial mortgage; and a creditor holding such mortgage cannot enforce same against the property to the prejudice of the wife's claim—no visible change of possession or dominion having taken place in the meanwhile. *Douglass vs. Douglass et al.*, 51 La. An. 1456 (26 Sou. 546).

A contract whereby one gives away his property, without reserving enough for his own subsistence, subject to the condition or charge that the donee shall thereafter maintain him, is void, *ab initio*, as contravening a prohibitory law; it can acquire no validity, either by lapse of time or by ratification, and the action of the donor to annul it and to recover his property is not barred by the prescription of five or ten years. (Arts. 1497 and 3544.) *Acumen vs. Larner*, 116 La. 102 (40 Sou. 581).

Refer to Arts. 2223, 2398, 2430, 3542, 3544.

Art. 2222. See *Goldman & Masur vs. Goldman*, 51 La. An. 771.

Art. 2223. See Art. 2221, 118 La. 305.

Art. 2227. See *Williams vs. Congregation Mater Dolorosa*, 128 La. 355.

Art. 2234.

This article was amended by Act 67 of 1908, omitting the following clause, which was formerly in the article: All proces verbals of sales of succession property signed by the Sheriff or other person making the same, by the purchaser and two witnesses, are authentic acts.

The execution of an act of donation made under private signature, and the subsequent certificate of a commissioner for Louisiana, made in another State, and executed in accordance with the common-law form, is not an act of donation such as is prescribed for a valid donation. The act with certificate appended was only an act under private signature. The donation not made in authentic form was invalid and null. It should be made before a notary and two witnesses. *Spanier vs. De Voe et al.*, 52 La. An. 581 (27 Sou. 174).

An act of procuration, under private signature, which is attached by the agent, named therein, to an authentic act purporting to have been executed under its authority, is not thereby proved or made authentic. *Denegre vs. Farex*, 52 La. An. 1760 (28 Sou. 316).

Parol evidence is not admissible to vary, contradict, or add to the stipulations of a written contract, complete on its face, in the absence of fraud or error. (Arts. 2236 and 2276.) *Dietzgen Co. vs. Kokosky*, 113 La. 454 (37 Sou. 24).

A deed of gift of lands in Louisiana, executed by the donor alone in the State of Texas by private act and acknowledged before a notary public, is null and void for want of the formalities required by the laws of *situs*. *Baker vs. Baker*, 125 La. 969 (52 Sou. 115).

Executory process on a notarial act of mortgage, executed by the president of a private corporation, will not lie in the absence of authentic proof of the president's authority to act. A paper purporting to be a copy of a resolution passed by the Board of Directors, and certified as a correct copy by a person styling himself as secretary, but not bearing the seal of the corporation, cannot be considered as an authentic instrument. *Interstate Trust & Bank Co. vs. Powell Bros. & Sanders Co.*, 126 La. 22 (52 Sou. 179).

Refer to Arts. 2236, 2242, 2276.

Art. 2235.

Parol evidence of a buyer is not admissible to contradict or destroy a deed of sale, especially when the vendor is dead, and a construction never intended may have been placed on his utterances by the buyer. The parol evidence of plaintiff cannot thus destroy her own solemn act. (Arts. 2236 and 2238.) *Barrow vs. Grant's Estate*, 113 La. 297 (36 Sou. 970).

Refer to Arts. 2236, 2238.

Art. 2236. See Art. 1497, 51 La. An. 1763; Art. 2234, 113 La. 454; Art. 2235, 113 La. 297; Art. 1901, 129 La. 895.

In the absence of written evidence, and in the absence of interrogatories on facts and articles, or proof of error or fraud, with only contradictory testimony, the Court will not hold that the act is a mortgage, although on its face it is an absolute sale. An authentic deed cannot be entirely changed without evidence more certain and direct than that offered by the plaintiff, and contradicted as it is, by the defendant's testimony. *Franklin vs. Sewall*, 110 La. 292 (34 Sou. 448).

Parol evidence is inadmissible to show that real estate bought by a third person was in reality bought by the complainant's debtor, and that the third person was merely a person fraudulently interposed to screen the property from the complainant. *Huffman vs. Ackermann*, 110 La. 1071 (35 Sou. 293).

Where an authentic act purporting to be a "sale with right of redemption" is placed of record, and the delay for redemption has passed without there being any evidence of record showing that the right of redemption had been exercised within the delay fixed, a person who has bought the property from the apparent vendee on the faith of the record will be protected in his purchase from an attack on his title by the apparent vendor on the ground that the act purporting to be "an act of sale with a right of redemption" was in reality only an act of mortgage securing a specific debt to the apparent vendee. *Jolivet vs. Chaves et al.*, 125 La. 923 (52 Sou. 99).

Refer to Arts. 2237, 2255, 2275, 2276, 2440, 2556, 2588.

Art. 2237. See Art. 2236, 110 La. 296.

Act No. 115, page 177, of 1888, provides that property may be sold for cash, and resold to the original owner by a homestead association on terms of credit, and that the second conveyance is to be regarded as a sale from which there springs a vendor's lien in favor of the association. *American Homestead Association vs. Karstendiek*, 111 La. 884 (35 Sou. 964).

Art. 2238. See Art. 2235, 113 La. 297.**Art. 2239. See Art. 1502, 110 La. 353; Art. 322, 51 La. An. 137; Art. 1468, 124 La. 14.**

Though a husband be estopped from denying that the property purchased during his marriage belongs to his wife, when the title is taken in her name, and he declares in the authentic act in which it was purchased that it was bought with her paraphernal funds, his children, being in law his forced heirs, are relieved entirely from the estoppel by the provisions of Act No. 5, page 12, 1884, and permitted to show the actual facts of the case by parol evidence. *Westmore vs. Hart*, 111 La. 305 (35 Sou. 578).

While forced heirs may, under certain circumstances, show by parol testimony, fraud, or simulation in sales of immovables made by their ancestor, such evidence is never admissible for the purpose of proving title in the ancestor, either directly or indirectly. *Wells vs. Wells*, 116 La. 1065 (41 Sou. 316).

The forced heirs have the right by parol to prove the second act simulated, after having, by proper testimony shown that Drew was really never an owner, but a mortgagee. Drew's status as a mortgagee did not become, by the expiration of time for redemption, that of owner; but, if it did, he had the right to waive the forfeiture, it being a matter in his interest. *Rion vs. Reeves*, 122 La. 650 (48 Sou. 138).

Art. 2239 relates to the character of evidence which forced heirs may offer to support a charge of simulation, but does not change the burden upon them regarding presumptions and proof, and does not affect Art. 2444, providing that the sale of immovable property, made by parents to their children, may be attacked by forced heirs as con-

taining a donation in disguise, if the latter can prove that no price has been paid, or that the price was below one-fourth of the real value at the time of the sale. *Byrd vs. Pierce*, 124 La. 429 (50 Sou. 452).

Refer to Arts. 2275, 2440, 2444.

Art. 2240. See Art. 2440, 106 La. 157.

Art. 2241.

An answer by a defendant, in executory process, to plaintiff's petition for an injunction, that the note and mortgage sued on in foreclosure proceedings were not signed by her, presented an issue of forgery, and the trial court should have tried and decided that issue. *Siekmann vs. Schwartz*, 128 La. 9 (54 Sou. 405).

Art. 2242. See Art. 2234, 52 La. An. 1762; Art. 2245, 107 La. 491.

To give an act under private signature the effect of an authentic act, it must be acknowledged by the party against whom it is adduced, and until it is so acknowledged it is inadmissible in evidence until the signatures thereto have been proved. *Saint vs. Martel*, 123 La. 823 (49 Sou. 582).

Art. 2245.

The rules of evidence to be applied in the prosecution in this State, of crimes, are those of the common law of England, save where it is otherwise provided by statute. (R. S. 976.) There has been no statutory modification of the common-law rule that, in prosecutions for murder, documents otherwise irrelevant, and which have not been admitted in evidence, are inadmissible when offered merely to prove handwriting by comparison. Arts. 2245, C. C., and Art. 325, C. P., establishing a different rule, are applicable only to civil proceedings. *State vs. Batson*, 108 La. 480 (32 Sou. 478).

Refer to Art. 2242.

Art. 2246.

Where A is the owner of real estate by undisputed title, and sells the same to B, who fails to record his title, the judgment creditors of A can acquire judicial mortgages on such property by recording their judgments after the

date of such sale and before its registry. And in such case, the judicial mortgages recorded against A prior to the registry of the sale, prime all such mortgages recorded against B, whether the latter be recorded before or after the former. *Baker vs. Atkins & Wideman et al.*, 107 La. 490 (32 Sou. 69).

Where real estate is inventoried and sold by order of the Court as the property of a succession, the title acquired by the adjudicatee will take precedence of an unrecorded title emanating from the decedent, though the holder of such title be in possession of the property, and though the adjudicatee might, by inquiry, have informed himself of its existence. *McDuffey vs. Walker*, 125 La. 153 (51 Sou. 100).

Whilst it is true that, as against the surviving husband, who has allowed the community property to be sold for taxes, and before the expiration of the year allowed for redemption has bought it from the tax purchaser, instead of redeeming it, the heirs of the deceased wife may enforce their equitable claim; and it may be held that the purchase inured to their benefit, and operated merely as a payment of the taxes, such claims cannot be enforced against third persons thereafter acquiring the property through mesne conveyances duly recorded, and tracing title back to the sale whereby the interests of the former head of the community and of the heirs of the deceased partner were divested. *Washington vs. Filer*, 127 La. 862 (54 Sou. 128).

Refer to Arts. 2262, 2264, 2266, 2253, 2254, 2275, 2440, 3222.

Art. 2247. See Art. 1922, 52 La. An. 269; Succession of Sinnott vs. Bank et al., 105 La. 715.

Art. 2248. See Succession of Moise, 107 La. 723.

Where the husband was a jewelry merchant, and there was a discrepancy of more than \$100,000 between the inventoried value of the stock on hand at the time of the dissolution and the amount of stock which the defendant should have had according to his own books: *Held*, that he is chargeable with such difference; and the burden is on him to prove that the result is due to the depreciation in values, and not the disposition of stock not entered on the books. *Hill vs. Hill*, 115 La. 490 (39 Sou. 503).

Refer to Art. 2249.

Art. 2249. See Art. 2248, 115 La. 494.

It provides that the books are proof against him. The debits and credits may be considered, we think, in determining whether balances are correct. The credits claimed by the accountant as carried on his books would not be conclusive proof. They should receive some corroboration. *Succession of Moise*, 107 La. 723 (31 Sou. 990).

Art 2251.

The law which declares that all contracts affecting immovable property which shall not be recorded in the parish where the property is situated shall be utterly null and void, except between the parties thereto (Laws 1855, p. 335, No. 274), is clear and unambiguous. It was intended to settle in this State the question whether knowledge possessed by a third person of a contract affecting immovable property should be considered, so far as such person is concerned, equivalent to the registry of the contract; and it settled that question in the negative. Fraud, however, cuts down everything. *McDuffey vs. Walker*, 125 La. 153 (51 Sou. 100).

Where a notarial act of sale of certain tracts of land, executed in the year 1849, was deposited in the office of the Parish Recorder, and was indorsed and indexed by that official, but in recording the deed there was a misdescription of part of the lands conveyed: *Held*, that the original deed forming a part of the archives of the Recorder's office was notice to third persons of the particular tracts of land intended to be conveyed. *Albert Hanson Lbr. Co. vs. Baldwin Lbr. Co.*, 130 La. ____ (58 Sou. 638).

Refer to Art. 2266.

Art. 2252. See Art. 503, 129 La. 513.**Art. 2253. See Art. 2246, 107 La. 492; Art. 2254, 114 La. 451.****Art. 2254. See Art. 2246, 107 La. 491; Art. 2255, 105 La. 136.**

Act No. 97, p. 107, of 1890, provides for the registry of titles to land, etc., conveyed by the State to the Board of Commissioners of the Atchafalaya Levee District, and the general law upon the subject of registry applies to the conveyance of all lands alienated by said board. Where A sells

land of which he is the owner to B, who fails to record his title, C, subsequently purchasing the same land from A, in good faith and without notice of the former conveyance, acquires a good title as against B. *Williams vs. White Castle Lbr. & Shingle Co.*, 114 La. 448 (38 Sou. 414).

Refer to Arts. 2253, 2264, 2266, 2275.

Art. 2255. See Art. 2236, 110 La. 1077.

Whilst it is true that, *quoad* the vendor and vendee, immovable property may pass beyond the control of the former by reason of an unrecorded sale, the proposition does not hold good as to third persons who are creditors of the vendor, and the property remains subject to seizure by them until the sale is recorded. In such a case the Courts will take notice of the fractions of a day, and a recorded seizure will take precedence of a subsequently recorded sale if the time can be ascertained by proof. *Bank vs. Ice Co.*, 105 La. 133 (29 Sou. 379).

Answers of a party to interrogatories on facts and articles relative to a verbal sale, alleged to have been made by him of immovable property, which negative such a sale, cannot be contradicted by parol evidence. A person in possession of writings received by him from another person which do not *per se* evidence a sale by the latter to him of the real estate referred to in the writings cannot, in order to establish such sale, eke out the writings by parol evidence on the ground that he had furnished a beginning of the proof. *Wright-Blodgett Co., Ltd., vs. Elms*, 106 La. 151 (30 Sou. 311).

Refer to Arts. 2254, 2258, 2262, 2264, 2275, 2266, 2415, 2439.

Art. 2257.

It is the duty of the Register of Conveyances for the Parish of Orleans, when called upon, to issue a certificate of non-alienation; and, where he certifies that, "according to the records of his office," the property has not been alienated, he will be liable for damages sustained by the party acting upon such certificate if it appears that a conveyance was registered in the books, though not properly indexed. *Gordon vs. Stanley*, 108 La. 183 (32 Sou. 531).

Art. 2258. See Art. 2255, 105 La. 143.

Art. 2262. See Art. 2255, 105 La. 136; Art. 2246, 127 La. 871.

Art. 2264. See Art. 2255, 105 La. 139; Art. 2246, 107 La. 491; Art. 2254, 114 La. 451; Art. 2246, 127 La. 871.

An unregistered sale of real estate is void as to third persons; and, in the absence of fraud alleged and proved against him, the vendee under a conveyance later in date but earlier in registry acquires a good title against the vendee under a conveyance earlier in date but later in registry. *Riggs vs. Eicholz*, 127 La. 745 (53 Sou. 977).

Refer to Art. 2266.

Art. 2265. See Art. 2246, 127 La. 871.

Art. 2266. See Art. 2255, 105 La. 136; Art. 2246, 107 La. 491; Art. 2254, 114 La. 451; Art. 2251, 125 La. 161; Art. 2246, 127 La. 871; Art. 2264, 127 La. 871.

Where the act is unrecorded, the person who buys the property from the ostensible owner in possession under title will acquire a valid title if he be an innocent third person. Proceedings in a suit in which the title to property is involved will not bind a person not a party who knew nothing of these proceedings. *Harrison vs. Ottmann*, 111 La. 730 (35 Sou. 844).

A deficient muniment of title to real estate cannot be supplemented by the recordation of the affidavit of the claimant. Such affidavit is a mere verbal statement of the claimant, which amounts to nothing at all as a muniment of title to real estate. In Louisiana, by bringing a suit to remove a cloud on the title, a plaintiff does not *ipso facto* admit that the muniments of title casting the cloud of which he complains are sufficient on their face to show title. He cannot be held to be admitting the very opposite of what he alleges and is trying to show. *Patterson vs. Landru*, 112 La. 1069 (36 Sou. 857).

An unrecorded agreement between two steam railroads relative to the cost of maintaining a common crossing in a public street, and of furnishing all necessary appliances, including an interlocking signal system, is null and void as to

a third corporation purchasing, without notice, the property and franchises of the debtor railroad corporation. *L. & N. Ry. vs. N. O. Terminal Co.*, 120 La. 978 (45 Sou. 962).

A precarious possessor, such as a usufructuary, or the holder of a servitude, notably a railroad enjoying a servitude of passage over its tracks, depots, etc., cannot change the character of its possession by merely acquiring a new title from some third person and causing it to be recorded; but must, in addition, indicate by some outward and visible signs of a pronounced character, calculated to challenge the owner's attention, his intention to hold no longer under the old title, but under the new. *John T. Moore P. Co. vs. M. L. & T. R. & S. S. Co.*, 126 L. 841 (53 Sou. 22).

Refer to Arts. 2275, 3510.

Art. 2268.

Copies from the book of conveyance of the Clerk and *ex-officio* Recorder's Office are copies of copies; and, as such, are not admissible in evidence. *Ruddock Cypress Co. vs. Peyret*, 113 La. 867 (37 Sou. 858).

Refer to Arts. 2269, 2279.

Art. 2269. See Art. 2268, 113 La. 868.

Art. 2271.

Plaintiffs should not have been permitted to prove an absolute promise to pay by defendant on the face of the allegation that she had offered to pay, but without interest. Her recognitive act under such circumstances, in so far as it contained anything beyond her legal obligation, was of no effect. *Martin Davie & Co. vs. Cargille*, 110 La. 876 (34 Sou. 807).

Art. 2272. See Tucker vs. Benedict, 114 La. 211; Art. 1855, 121 La. 435.

Where the board of directors of a corporation, after full knowledge of the facts of the sale have been communicated to it, agreed to receive payment of interest on the note it held, representing part of the purchase price, and extended the note, it ratified the sale as made. Thereafter it was estopped to seek avoidance of the sale because the president in terms thereof exceeded his authority. *Poche vs. N. O. Home Investment Co. et al.*, 52 La. An. 1287 (27 Sou. 797).

Parties are not held to have ratified proceedings which are null when they act in ignorance of such nullities. Whilst the silence of counsel may at times authorize the presumption that a particular ground of attack or defense set up in the pleadings has been abandoned, such presumption is not *juris et de jure*, and will not be enforced when it is reasonably certain that the intention to abandon never existed. *Doucet vs. Fenelon*, 120 La. 19 (44 Sou. 908).

Art. 2273.

A donation of land under private signature is a nullity. The donation has not been ratified and confirmed by the donee. The donee did not go into actual possession. There never was an express acceptance of the donation. The property was sold at Sheriff's sale. The heirs of the donee knew of the sale and raised no objection. The title of the property passed to third persons, who have a right to set up title in opposition to plaintiff's title, which was null and void, and which was never ratified in the manner required. *In re Lahaye*, 115 La. 1089 (40 Sou. 468).

Estoppel has no application to a donation void *ab initio*. The instrument sued on is in form an act under private signature. (See C. C., Art. 1536.) *Baker vs. Baker*, 125 La. 974 (52 Sou. 115).

Art. 2274.

A son holding land by donation from his father, but as to which the act of donation is void for want of form, owes no rent for the land to the succession of the father, except from the day the legal demand is made for its return. Such a title, not being one within the prohibitions of the law, is merely voidable; and until avoided he held as owner. While voidable, it was such a title as the heirs of the deceased might have confirmed. *Succession of White*, 51 La. An. 1703 (26 Sou. 428).

Art. 2275. See Art. 2255, 105 La. 136, and 106 La. 157;

Art. 2246, 107 La. 491; Arts. 2236 and 2440, 110 La. 1076; Art. 2266, 112 La. 1073; Art. 1801, 114 La. 244; Art. 2254, 114 La. 451; Art. 2239, 116 La. 1070; Art. 1926, 117 La. 283; Art. 2236, 125 La. 930.

The promisor and the promisee had agreed upon the terms and conditions of the sale. It appears that, upon the

payment of the price, the promisee, who was in possession as tenant, was to become the owner. The promisee made the first payment of the price, and the condition from that moment was analogous to a sale. The promisor subsequently undertook to sell the property to another person. This could not legally be done. The receipt contains evidence of an absolute promise of sale. It was not exclusively a receipt, which can be explained by oral evidence. To the extent that it was a promise of sale, and evidenced the consent, the price and the thing, it could not be added to, changed or explained by parol evidence. *Barfield vs. Saunders*, 116 La. 136 (40 Sou. 593).

Verbal testimony is not admissible to change the nature of the rights of the parties in a deed, or to vary its terms, third persons having accepted the record as true. *Jenkins vs. Salmen Brick & Lbr. Co.*, 120 La. 549 (45 Sou. 435).

In order that a contract for the sale of real estate be enforced, or that damages be recovered for non-compliance therewith, such contract (save where the vendee is put in actual possession) must be in writing. Hence, a petition which sets up a written contract, purporting to be a promise to sell and buy real estate, and also sets up a subsequent verbal contract, whereby an essential condition of a written contract is alleged to have been abrogated and superseded, and which, praying for the enforcement of both contracts, demands a forfeiture of a deposit made by the proposed vendee, discloses no cause of action. *Lyons vs. American Cigar Co.*, 121 La. 592 (46 Sou. 658).

An original vendor who has remained in possession of a very small piece of a woodland tract, part of a larger tract sold by him, cannot set up his possession to defeat the title of a third person acquired years before the institution of the suit. *Van Zandt vs. Bodcaw Lbr. Co.*, 128 La. 924 (55 Sou. 577).

Refer to Arts. 2276, 2439, 2440, 2462.

Art. 2276. See Art. 2236, 110 La. 299; Art. 2234, 113 La. 454; Art. 1900, 116 La. 665; Art. 2275, 120 La. 555, and 128 La. 931.

The parol evidence offered to show the waiver was admitted without objection; and, hence, there is no question of admissibility. *Murphy vs. Royal Ins. Co.*, 52 La. An. 778 (27 Sou. 143).

Where a provision inserted in a written contract by one of the contracting parties is susceptible of two interpretations, the other contracting party is entitled to the interpretation most favorable to him; but parol evidence may be admitted without special plea to explain the ambiguity. *Bank vs. Meyers et al.*, 52 La. An. 1769 (28 Sou. 136).

Where a writing, although embodying an agreement, is manifestly incomplete and not intended by the parties to exhibit the whole agreement, but only to define some of its terms, such parts of the actual contract as are not embraced within its scope may be established by parol evidence. Article 2276 is not violated by allowing parol evidence to be given as to a distinct, valid, contemporaneous, collateral agreement, which was not reduced to writing, when the same is not in conflict with the written agreement. *Davies vs. Wm. W. Bierce*, 114 La. 663 (38 Sou. 488).

As a general rule, a written agreement is conclusive between parties and privies. There was no allegation of error or fraud. Conversations and conduct prior to or at the time of the agreement cannot be admissible to change stipulations of an authentic act of lease. *Jackson Brewing Co. vs. Wagner*, 117 La. 875 (42 Sou. 356).

Before signing the order, the defendant obtained from the soliciting agent a written certificate to the effect that the order was given conditionally upon his acceptance after arrival of the goods. Knowledge of this was communicated to the plaintiff company neither by the agent nor by the defendant until after the goods were found unsatisfactory. Defendant has no right to return the goods. *Advance Thresher Co. vs. Roger*, 123 La. 1067 (49 Sou. 709).

Under Art. 2276, a contract reduced to writing cannot be modified by parol proof of what was said or done before or at the time of the execution of the writing, although the attending circumstances are provable. *Hafner Mfg. Co. vs. Lieber Lumber & Shingle Co.*, 127 La. 349 (53 Sou. 646).

Parol testimony is admissible for the purpose of showing whether undeclared dividends pass to the purchaser of shares of stock in a corporation; but its effect must be restricted to the parties to the transaction. *Rivers vs. Oaklawn Sugar Co., Ltd.*, 52 La. An. 762 (27 Sou. 118).

Art. 2277. See Succession of Sinnott vs. Eank et al., 105 La. 710; Pelletier vs. State National Bank, 117 La. 343; Harliss vs. Drews & Herbert, 119 La. 208.

Where the alleged agreement, involving the advance of \$50,000 by a firm in G to a firm in New Orleans, must have been made or evidenced by letters or other writings, the presumption is against the plaintiff, who produces no such written evidence nor accounts for its absence, but relies on his own testimony to establish the original agreement. *Hannay vs. N. O. Cotton Exchange*, 112 La. 998 (36 Sou. 831).

The defense rests upon the theory that the testimony of one witness must be completely corroborated upon every point, whilst the law requires a general corroboration, not a special and minute corroboratin as to every item of an account or list. *Morris vs. Pratt*, 114 La. 101 (38 Sou. 70).

Even against a living person, the testimony of a single credible witness is, *per se*, insufficient to show a verbal contract involving more than \$500 in value. *Succession of Gabisso*, 122 La. 829 (48 Sou. 277).

A parol contract for services exceeding \$500 may be proved by the testimony of one credible witness and corroborative circumstances tending to show a contract of employment, the performance of valuable services and promises of remuneration. *O'Neill vs. Guyther*, 123 La. 101 (48 Sou. 759).

Article 2277 does not apply where there were four witnesses to testify to the genuineness of a note. *Siekmann vs. Berges*, 127 La. 944 (54 Sou. 295).

It is the policy of the law that recorded titles shall not be lightly set aside; and, where a title has remained recorded in the names of two people for a great many years without protest from anyone, and many of those in interest have died, this Court will not set aside this title on the testimony of one witness who is uncorroborated by any person or any set of facts. *Succession of Lewis vs. Lewis*, 129 La. 639 (56 Sou. 621).

Testimony which seeks to charge a dead person with a debt or his acknowledgment is of the weakest kind; and, as the amount is over \$500, it requires two witnesses, or one witness and corroborating circumstances; so that defend-

ant's claim cannot be allowed. *Succession of Turgeau*, 130 La. — (58 Sou. 497).

Refer to Arts. 2278, 2992.

Art. 2278. See Art. 2208, 105 La. 803; Art. 2277, 130 La. —.

It is the settled law of this State that a revival is not intended to be an exclusive mode of preventing the prescription of judgment, and that the prescription of a debt evidenced by a judgment can be interrupted in the same manner as any other debt, provided the acknowledgment of the judgment debt be in writing. *Ducheene vs. Board of Liquidation*, 51 La. An. 1149 (26 Sou. 55).

Plaintiff sought to prove an interruption of prescription by parol evidence that certain checks made by third parties to the order of Henry Jacobs had, in order to pay the interest upon the notes, been handed to the plaintiff by Jacobs, with the words "Henry Jacobs" indorsed upon them, and that, as so indorsed, they were paid on presentation. The name "Henry Jacobs" was written by neither the maker (Jacobs) nor by any agent for him. The testimony, under Art. 2278, was inadmissible for that purpose. *Weil vs. Jacobs' Estate*, 111 La. 357 (35 Sou. 599).

Allegations put into the petition for the purpose of taking the case out of prescription are not admitted by the filing of a plea of prescription. A debt on which prescription has accrued can be revived only by the debtor's consent. A bare payment on the debt is not of itself proof of such consent. *Manders vs. Irwin*, 118 La. 1048 (43 Sou. 698).

Except as tending to prove a continuing acknowledgment of the debt, the facts established by parol evidence would not have the effect of either suspending or interrupting prescription, since a note is not rendered immune from prescription by the fact of its having been accepted by way of investment. *Darby vs. Darby et al.*, 120 La. 848 (45 Sou. 747).

The object and effect of Art 78, p. 86, of 1888, amending Art. 3538, are not to prohibit proof of an interruption of the prescription running upon accounts sued on, which are governed by that prescription by reason of parol evidence; but to prevent such evidence, when received, having the effect of shifting the prescription of three years

applicable to those accounts to a prescription of ten years. *Henry Block Co. vs. Papania*, 121 La. 683 (46 Sou. 694).

Under Art. 2278, parol evidence and memoranda not signed by the creditor are not admissible to prove any acknowledgment or promise of a party deceased to pay any debt or liability in order to interrupt prescription or to revive the claim after prescription has run. An acknowledgment by payment on account is included in the prohibition. *Succession of Driscoll*, 125 La. 287 (51 Sou. 200).

Under Art. 2278, it did not justify the exclusion of parol evidence to prove an agent's authority to indorse a note for defendant mill company, thereby establishing that the debt was that of the mill company, and not of a third person. *First National Bank vs. Johnson*, 130 La. — (57 Sou. 930).

Refer to Art. 3538.

Art. 2279. See Art. 2268, 113 La. 868.

After the loss of the deed is shown, the question is one of weight of the testimony introduced in evidence to prove its contents. If the weight of testimony and all the facts and circumstances sustained the claim to title, it will be held legal against one who does not show a better right to the property. The defendants are in possession, and they and their ancestors in title have been in possession for a number of years under a recorded title. The hiatus in the chain of title is not one which can be of any avail to the plaintiff. *Willett vs. Andrews et al.*, 106 La. 319 (30 Sou. 883).

In a suit on banknotes purporting to have been issued in 1856, and which are genuine on their face, mere possession makes out a *prima facie* case in favor of the holder; and the burden of proof rests on the defendant to show, as alleged, that such notes were not issued by its predecessor bank, but were lost or stolen, and that plaintiff acquired the same in bad faith or with notice. *Pelletier vs. State National Bank*, 114 La. 174 (38 Sou. 132).

Mandamus is resisted because the former certificate by the predecessor company, in lieu of which the certificate claimed was issued, is not produced and surrendered for cancellation. A willingness is expressed to deliver if security is given to indemnify against the appearance of the old certificate. *Held*, not a case for the application of Art. 2279, which authorizes the Court, "in case circumstances

render it necessary," to order security. *Held*, further, that respondent company may with safety deliver up the certificate without security. *State ex rel. Seaton vs. N. O. & C. R. R. Co.*, 51 La. An. 909 (25 Sou. 465).

Refer to Art. 2280.

Art. 2280. See Art. 2279.

Art. 2281.

All persons not expressly disqualified may testify. Effect may be given to a statute repealing a disqualifying statute immediately after it becomes a law. When the law abolishing the disqualification of certain witnesses was enacted, it went into effect and applies to pending cases. *Dunning vs. West*, 51 La. An. 618 (25 Sou. 306).

The wife of the plaintiff and mother of the child is competent to testify in substantiation of the claim asserted on behalf of the child, but not as to that asserted on behalf of the husband or the community. *Watson vs. Lyons*, 51 La. An. 1698 (26 Sou. 440).

If husband and wife are joined as plaintiffs in a suit in enforcement of separate interests, they may be witnesses for or against their separate interests therein. *Schoppel vs. Daly*, 112 La. 202 (36 Sou. 322).

Attention is called to *State vs. Williams*, 111 La. 179, relative to disqualification of witnesses on the ground of lack of understanding of the nature of an oath. (See Act No. 29, p. 39, of 1886.) *Romano vs. Seidel Furniture Mfg. Co.*, 114 La. 432 (38 Sou. 409).

In those personal actions of the wife which are under the control of, and brought by, the husband, both husband and wife are competent witnesses; but in actions for damages resulting from personal injuries to the wife the testimony of the husband should be excluded. *Martin vs. Derenbecker*, 116 La. 495 (40 Sou. 849).

The husband cannot be a witness for or against the wife in matters affecting her paraphernal rights. If there was agency, it must first be proved. *Bianchi vs. Del Valle*, 117 La. 587 (42 Sou. 148).

Though the husband knows better than anyone else possibly can what his means are, he cannot be called upon by the wife to give testimony on that subject. Though evidence on that subject has been received from him, the Court

will not give it effect, though no bill of exceptions was reserved. *Nissen vs. Farquhar*, 121 La. 642 (46 Sou. 679).

Where, in a divorce suit brought by the wife, the husband is ruled to show cause why he should not be punished for contempt for failing to pay alimony as ordered, the husband is a competent witness for the purpose of purging himself of the contempt charged. Such a proceeding is criminal in its nature. *Stoddard vs. Stoddard*, 122 La. 151 (47 Sou. 446).

The affidavit was received in evidence over the defendant's objection that the husband cannot be a witness against his wife nor the wife for or against her husband. That ruling is correct, as it is inconsistent to recognize the prohibition in Art. 2281, a rule of public order so stringent that the testimony of husband or wife in divorce cases, even though introduced without objection, must be disregarded, and yet to receive the statement and declarations of the spouses, which they cannot be heard to explain, qualify or contradict. *Wolf vs. Wolf*, 128 La. 726 (55 Sou. 333).

Art. 2282. See *Files vs. Railroad Lands Co.*, 123 La. 109.

The testimony of a plaintiff in his own favor to establish a large claim against a succession should be received with the greatest caution. It is, within itself, of the weakest character; and, unless strongly corroborated, cannot serve as a basis of a judgment of recovery. *Caldwell vs. Turner*, 129 La. 19 (55 Sou. 695).

Art. 2286.

In order that there should be *res judicata*, the thing demanded and the cause of action must be the same; and they are not the same in two suits for the licenses of different years. *State vs. Sugar Refining Co.*, 108 La. 603 (32 Sou. 965).

In the former cases the City of New Orleans alone was defendant. In this case the State also is a defendant. The former cases arose under Constitutions and laws antedating the Constitution of 1879. The present case has arisen under the Constitution of 1879. In the former cases the question of irrepealability of the exemption because of its contractual nature was not raised. In the present case the question is, we assume, the main contention raised. Evidently the two identities of parties and cause of action are

lacking. *Female Orphan Society vs. Board of Assessors*, 109 La. 539 (33 Sou. 592).

The doctrine of the common-law Courts that *res judicata* includes not only everything pleaded in a cause, but even that which might have been pleaded, does not obtain generally under our system. *Woodcock vs. Baldwin*, 110 La. 270 (34 Sou. 440).

A judgment dismissing a suit brought by mortgagees to annul a tax sale of the property mortgaged does not constitute *res judicata* as against the owner of the property who had acquired from such mortgagees before the tax sale, and who was not a party to the litigation resulting in such judgment. *R. McWilliams vs. Gulf States L. & Imp. Co.*, 111 La. 194 (35 Sou. 514).

The judgment in favor of the lessee company on the merits and upon grounds not personal to that company was a bar in a subsequent suit on the same cause of action against the lessor company. *Muntz vs. Algiers & G. St. Ry. Co.*, 116 La. 237 (40 Sou. 688).

The rule of law that a suit brought against the vendor is binding notice to the vendee is applicable to a sale under foreclosure of a mortgage when it appears that the mortgage creditor was made a party to the suit. Whatever may be the doctrine of Courts in other jurisdictions, this Court has uniformly followed the language of the Civil Code, and insisted that, in order to constitute *res adjudicata*, the thing demanded and the object of the judgment must be the same. *Scovel vs. Levy's Heirs*, 118 La. 982 (43 Sou. 642).

Refer to Art. 2453.

Art. 2287.

The legal presumption in favor of the community dispenses those claiming community rights or asserting community obligations from other proof; and it is incumbent on those denying the community and asserting the property or funds to be the separate estate of the wife to prove affirmatively and satisfactorily that the same is hers. *Succession of Manning vs. Burke*, 107 La. 456 (31 Sou. 862).

Art. 2288.

In reaching their conclusions as to whether a person has committed suicide, the Courts are not tied down by the rigid rules of the criminal law. They are authorized to act

upon circumstantial, as well as direct, evidence. The presumptions upon which they act should be weighty, precise and consistent. The death of a person resulting from morphine administered by himself is, in one sense, death from his own hands; but it is not necessarily suicide. *Brignac vs. Pacific Mutual Life Ins. Co.*, 112 La. 575 (36 Sou. 595).

A defendant in a petitory action brought by heirs of the deceased, patentee from the Government, relied on entries in the index book of conveyances in the Recorder's office showing a sale by the patentee to a third person, under whom defendant claimed, but the record of the act evidencing the sale was not found. A map, invariably correct, disclosed that the land in the section was in the joint names of the patentee and the third person. Subsequently the land in question was sold in the succession of the third person during the life of the patentee, who lived on the adjoining plantation. Defendants claimed as a remote grantee under such sale. *Held*, there was a failure to show a divestiture of the patentee's title to the land in controversy. *Poirier vs. Burton-Schwartz Cypress Co.*, 127 La. 936 (54 Sou. 292).

Art. 2291.

Article 2291 must be construed in its relation to other provisions of law which determine the capacity of the individual and the validity of his acts. One cannot confess away that which, in the interest of public order and good morals, he is prohibited by law from alienating. It may happen that, a plaintiff being estopped to allege a state of facts which defendant is estopped to deny, the interest of justice will require that both should be liberated. *Ackerman vs. Larner*, 116 La. 101 (40 Sou. 581).

A litigant, having been sued in the Circuit Court of the United States as a resident of Illinois, and having obtained the benefit of an exception to the effect that he has his domicile in Louisiana, cannot be held, when sued at such domicile, to plead to the jurisdiction of the State Court on the ground that he is domiciled in Illinois. *Caldwell vs. Nelson Morris Co.*, 120 La. 879 (45 Sou. 927).

Where a deed to a married woman recited that the purchase was made with her own separate and paraphernal funds for herself, her heirs and assigns, such recital estopped the husband and his heirs to deny the title of the wife. *Succession of Hostetter*, 128 La. 468 (54 Sou. 961).

Art. 2292. See Morgan's L. & T. R. & S. S. Co. vs. Stewart, 119 La. 407.

Art. 2294. See Morgan's L. & T. R. & S. S. Co. vs. Stewart, 119 La. 408.

The view that this article enlarged the remedy for damages arising from torts has been answered in the negative. *Walker vs. V. S. & P. Ry.*, 110 La. 720 (34 Sou. 749).

Refer to Art. 2315.

Art. 2299. See Art. 1683, 105 La. 601.

Art. 2300. See Art. 1683, 105 La. 601.

Art. 2301. See Morgan's L. & T. R. & S. S. Co. vs. Stewart, 119 La. 401; Seckinger vs. Cheneyville, 125 La. 278; Art. 1757, 107 La. 224.

The orange grove having been destroyed by a fortuitous event, a *vis major*, the purchaser of the crop of oranges which the grove was expected to grow in the contract years had the right to recede from the contract. This being so, the seller is bound to make him restitution of that portion of the price received. (C. C. 2497, 2301, 2302, 2304.) But this was reversed on a rehearing on the ground that it was the sale of a hope. *Losecco vs. Gregory*, 108 La. 646 (32 Sou. 965).

Where the evidence shows that plaintiff, through the interposition of third persons acting as his secret agents, and prior to the institution of this suit, collected from the defendant bank some of the notes so found or acquired by him, and that such payments were made by the officers in ignorance of the facts of the case, plaintiff will be condemned to restore the money thus unduly received by him. *Pelletier vs. State National Bank*, 114 La. 174 (38 Sou. 132).

A draft was discounted, with bill of lading attached. It was genuine, and was drawn on the plaintiff with his authorization, and was paid by him. The bill of lading was a forgery. Plaintiff sued the defendant to return the amount on the ground that it was paid in error, and that defendant was liable for the error. What mistake there was was plaintiff's for trusting the dishonest drawer of the draft, who annexed to it a forged bill of lading. *Varney vs. Monroe Nat. Bank*, 119 La. 943 (44 Sou. 753).

Where an interstate carrier represents to a shipper that a certain freight rate has been established between given points, and such rate has in fact been published, and the shipper sends his goods upon the faith of such representation and publication, and is thereafter coerced into paying a higher rate, a State Court has jurisdiction to hear and determine his suit for the recovery of the amount thus overpaid. *Pine Tree Lbr. Co. vs. C. R. I. & P. Ry. Co.*, 123 La. 583 (49 Sou. 202).

The laws regulating tax sales and the collection of taxes are *sui generis*, and constitute a system to which the general provisions of the Code have, ordinarily, but little application. *Lisso & Bros. vs. Police Jury*, 127 La. 283 (53 Sou. 566).

Refer to Arts. 2302, 2303, 2304, 2497.

Art. 2302. See Art. 2301, 108 La. 656, and 119 La. 946.

Art. 2303. See Art. 2301, 127 La. 283.

The sum was paid out of the appropriation for judicial expenses. "All costs for which the State may become liable are to be paid out of this fund." (Act No. 65, p. 71, of 1884.) The State did not become liable for the costs. In settlement with the State in matter of this fund, he cannot be charged an amount for costs for which he never became liable. The defendants have already been condemned to pay costs. The terms of the judgment in the original cause cannot now be changed. There was no natural obligation on the part of the State to pay costs, and, therefore, she can recover the amount, even after payment. *State vs. N. O. Debenture Redemption Co.*, 112 La. 1 (36 Sou. 205).

Art. 2304. See Art. 2301, 108 La. 656.

Art. 2308. See Arts. 1536 and 1757, 110 La. 658.

Art. 2310.

If, by error or ignorance, one has done himself a prejudice which cannot be repaired without breaking in upon the right of another, the error cannot be corrected to the prejudice of the latter. *Henderson vs. Shaffer*, 110 La. 482 (34 Sou. 644).

A wife has a legal right to pay the debts of the husband should she so desire. A payment made by her of a debt of

her husband to prevent the sale of certain property under the erroneous belief that it belonged to her will not justify her in recovering it from the person to whom the payment was made when the effect of the payment was to cause the seizure of the property to fall and the writ of the seizing creditor to be returned. *Pelletier vs. State Nat. Bank*, 117 La. 336 (41 Sou. 640).

Art. 2314. See Art. 508, 51 La. An. 1707; Art. 502, 113 La. 339.

The joint owner in possession is accountable for rents, and is entitled to recover money expended for taxes, insurance and necessary repairs, which inured to the benefit of his co-owners. He cannot, in the absence of contract, charge commission on collections or compensation for superintendence. *Sharp vs. Zeller*, 114 La. 550 (38 Sou. 449).

In a petitory action the defendant, possessor in bad faith, cannot recover the value of buildings separable from the soil unless plaintiff elect to keep them. The defendant, possessor in bad faith, may recover necessary expenses incurred in the preservation of the property, such as taxes and repairs on construction and works belonging to the owner. *Quaker Realty Co. vs. Bradbury*, 123 La. 21 (48 Sou. 570).

Art. 2315.

As amended by Act 120 of 1908, p. 178, this article reads as follows: Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action shall survive in case of death in favor of the children or widow of the deceased, or either of them; and, in default of these, in favor of a surviving father and mother, or either of them; and, in default of any of the above persons, then in favor of the surviving brothers and sisters, or either of them, for space of one year from the death; provided, that, should the deceased leave a widow, together with minor children, the right of action shall accrue to both the widow and minor children; provided, further, that the right of action shall accrue to the major children only in those cases where there is no surviving widow or minor child or children.

The survivors above mentioned may also recover the damages sustained by them by the death of the parent, or child, or husband, or wife, or brothers, or sisters, as the case may be.

General Construction of Article.

The purchaser knew that a verdict had been returned against his vendor for a large amount at the date that he bought the property, the sale of which is attacked by plaintiff, who is a judgment creditor of the vendor. The date of a debt for tort cannot be confined to the judgment, which follows a credit, but it dates at least from the verdict. It was after verdict that the buyer bought the property, the title to which property is attacked. *Goothye vs. Delatour*, 111 La. 766 (35 Sou. 896).

Article 2315 is based upon the broad and beautiful precept laid down in the Institutes of Justinian—to wit, to hurt no one. Carrying out that precept, this Court has held that technical distinctions are not entitled to fail. *Martin vs. The Picayune*, 115 La. 985 (40 Sou. 376).

Where a person has conferred on him by law several remedies to enforce an obligation or duty legally owing to him, he (and not the person owing the obligation or duty) has the right to select the particular remedy he shall have recourse to. If he has the right to an action "*ex delicto*," he may avail himself of it; but, if he chooses to do so, he can waive it and sue by virtue of a statutory right of action, if one has been given to him. The action brought by the plaintiff is one expressly granted by law. *Morgan's L. & T. R. & S. S. Co. vs. Stewart*, 119 La. 392 (44 Sou. 138).

Plaintiff must prove that defendant is at fault before a judgment for damages resulting from an accident can be recovered. Where plaintiff alone is at fault, damages cannot be recovered for an accident. *Marsalis vs. L. & N. W. Ry. Co.*, 129 La. 146 (55 Sou. 744).

A person in whose possession and under whose control combustible material becomes ignited, and who, by removing it in order to save his own property, destroys the property of another, is not in a position to claim the benefit of the rule that one compelled to act in an emergency is not held responsible for failure to exercise the better judgment which might result from deliberation, since that rule is ap-

plicable as between the persons who act and the persons by whose fault they are compelled to act without time for deliberation. The case may be governed by another recognized rule—to wit, that, where a loss is to be borne by one of two innocent persons, it falls upon him who is least innocent. *Latta vs. N. O. & N. W. Ry. Co.*, 131 La. —— (59 Sou. 250).

Who Can Recover.

[NOTE.—Vol. 122 *et seq.* of the Louisiana Reports contain interpretations of the act as it stands to-day.]

Plaintiff's minor son, a day laborer, was instantly killed while engaged in the service of defendant, assisting in the work of placing in position a heavy steam boiler. It is shown that, with proper appliances, skill and care, the work could have been done in safety. Because of the want of these, the defendant is held liable. *Kimbell vs. Homer Compress & Mfg. Co.*, 109 La. 963 (34 Sou. 39).

The right of action granted to the widow and minor children for damages resulting from the death of the husband and father by the fault of another is given for the space of one year from the death. *Goodwin vs. Bodcaw Lbr. Co.*, 109 La. 1050 (34 Sou. 74).

In a suit for personal injuries where the plaintiff has died from other causes, his mother, substituted as plaintiff, is entitled to recover damages for his pain, suffering and disfigurement and his pecuniary loss from disability up to the time of his death. *Payne vs. Georgetown Lbr. Co.*, 117 La. 983 (42 Sou. 475).

The widow and minor children by second marriage of one who loses his life through the negligence of another person can exercise the right of action conferred by Act 71, p. 94, of 1884, for the recovery of the damages sustained by them, without joining as plaintiff the decedent's minor children by a previous marriage. *Robideaux vs. Hebert*, 118 La. 1089 (43 Sou. 887).

A statutory right of action arising after the death of the husband is not one of the civil effects of marriage which inures to the benefit of the putative wife under Arts. 117 and 118. The right to sue for damages for the death of the husband is restricted to his lawful wife and widow, and cannot be extended by construction so as to include his pu-

tative wife by a bigamous marriage. *Vaughn vs. Dalton-Lard Lbr. Co.*, 119 La. 61 (43 Sou. 926).

The usufruct which the parent enjoys upon the estate of the minor child does not extend to any estate which the child may acquire by his own labor and industry. Hence, the earnings of a minor are not to be considered in a suit brought by the parent to recover damages sustained by him in consequence of the death of his child through the negligence of his employer. *Bourg vs. Brownnell-Drews Lbr. Co.*, 120 La. 1010 (45 Sou. 972).

The right granted to the surviving father or mother to recover damages for the death of their son is a right granted to the actual father and mother of a child, and not an adopting parent. *Mount vs. Tremont Lbr. Co.*, 121 La. 64 (46 Sou. 103).

Under Art. 2315, a citizen and resident of a foreign country may sue for the negligent death of his son occurring in Louisiana. *Lykiardopoulos vs. New Orleans & C. R., L. & P. Co.*, 127 La. 310 (53 Sou. 575).

Assuming that desertion, without lawful excuse, on the part of the wife, is sufficient to deprive her as widow of the statutory right to sue for damages for the suffering and death of the husband because, by the fault or negligence of a third person, such desertion is not shown by the mere fact that the wife lived separate and apart from her husband during the pendency of a divorce suit by him instituted. The allegation that certain facts constitute abandonment is a conclusion of law. *Williams vs. Nona Mills Co.*, 128 La. 811 (55 Sou. 414).

Under Art. 2315, as amended by Act 120 of 1908, the father and mother, or either of them, in default of a widow or children, succeed to the right of action for the recovery of damages for their child, who loses his life through the fault of another; and they have also a right of action conferred by the statute to recover the damages sustained by them in consequence of such death. *Robertson vs. Town of Jennings*, 129 La. 795 (56 Sou. 891).

Under Act 120 of 1908, brothers and sisters, in default of child, widow or parent, succeed to the right of action which a person who dies from an injury had, at the moment of his death, against him by whose fault the injury was received; and they (the brothers and sisters) have also a right of action upon their own account for the recovery

of damages for the injury, moral or mental, as well as material, sustained by them by reason of such death. *Underwood vs. Gulf Refining Co.*, 128 La. 969 (55 Sou. 641).

Railway and Street Car Accidents.

A child of three and a half years is, of itself, incapable of contributory negligence. No man should be in charge of an electric car as motormen, running along populous thoroughfares of a city, who has not the complete use and sight of both eyes. *Rice vs. Crescent City Railroad Co.*, 51 La. An. 108 (24 Sou. 791).

The parties in charge of a railroad train do not perform their whole duty under all circumstances by pursuing the regulation method of giving notice by the ringing of a bell or following out any prescribed method of giving warning. The precautions to be adopted and the steps to be taken in aid of safety increase as the danger of accident and injury is increased; and their sufficiency is to be gauged by what is called for by the circumstances of each case. In this case a work-train was backing down a rarely used siding across a populous street. *Downing vs. Ry. & S. S. Co.*, 104 La. 508 (29 Sou. 207).

Where trainmen back a train opposite a danger point in the streets of a city, without precautions of any kind to warn the citizens, at the precise moment that a passenger train is moving in the other direction on a parallel track, the company is responsible for any injury to a person occupying the open space between the two tracks, although the person injured may have contributed to some extent by imprudently backing in a moment of forgetfulness into the open space taken up by the overlapping of cars outside the rails. *Lampkin vs. McCormick, Receiver*, 105 La. 418 (29 Sou. 952).

If a railroad company in the management of its traffic causes unusual peril to travelers, it should meet such peril by corresponding precautions. The general public are not called upon to know or take in at a glance that the space between two parallel tracks in a city is not wide enough to afford protection to persons standing on that space. A person has the right to assume that the width is sufficient. *Eichorn vs. N. O. & C. R., L. & P. Co.*, 112 La. 237 (36 Sou. 335).

The negligence which occasions fright and causes serious personal injury is actionable. *Stewart vs. Ark. Southern Ry. Co.*, 112 La. 765 (36 Sou. 676).

It does not necessarily follow, because an act which is charged to have caused damage to another is violative of a city ordinance, that that fact itself enters as a factor in determining whether the party complaining has a right of action. Evidence that no accident had followed for a long time after the existence of a certain fact would not be determinative of its not being actually, by a concurrence of special facts, dangerous. To the knowledge of parents of children in the neighborhood the ordinance was violated, and without objection or protest from them, is evidence that the violation was not considered dangerous. *Lopes vs. Sahue*, 114 La. 1005 (38 Sou. 810).

Where the owner of a machine not in its nature dangerous turns it over to the use of another person in apparent good order, he is not liable for injuries at a later date to an employee of such other person, whether from undiscovered defects in such machine or from its misuse; and the cause is the same though the person to whom the machine is turned over be an independent contractor who uses the machine in the execution of a contract with the owner. *Robideaux vs. Hebert*, 118 La. 1089 (43 Sou. 887).

Where the locomotive and car attached thereto, which ran over and killed a man, belonged in fact to a particular corporation, and was in the possession and under the control of its employees, another corporation, from which it had bought the property, with which the man killed had no connection, is not legally responsible for the tort by reason of the fact that the act of sale of the property was not registered in the conveyance book of the parish where the tort was committed, or that the property continued to be assessed in the name of the vendor. *Goodwin vs. Bodcaw Lbr. Co.*, 109 La. 1050 (34 Sou. 74).

Slander and Libel.

All that is necessary for a person judicially claiming damages to himself for a slander is to allege a condition of things such as would show a fault on the part of the defendant, accompanied by a claim of resulting damage therefrom, and upon the trial of the case to establish the truth of his

allegations. Plaintiff may recover compensatory damages whether there was actual malice or not on the part of the defendant. Actual malice arises only when punitive damages are claimed. *Covington vs. Robertson*, 111 La. 326 (35 Sou. 586).

A litigant who, without probable cause, makes a defamatory allegation against his adversary, knowing it to be false, commits a fault within the meaning of the above statute, and cannot escape liability on the score of the allegations having been material to the issue. *Lescalle vs. Jos. Schwartz Co.*, 116 La. 293 (40 Sou. 708).

The privilege of exaggerating facts in pleading is allowed as a rule; but this privilege is restrained by some limit—viz., a party or his counsel shall not avail himself of his situation to gratify private malice. Subject to this restriction, it is for the public interest and calculated to serve the purpose of justice to allow a party or his counsel some latitude in making allegations and some freedom of speech in conducting his case. *Dunn vs. Southern Ins. Co.*, 116 La. 432 (40 Sou. 786).

To apply the term "negro" to a white person is humiliating and insulting; and a suggestive question, such as "Don't you belong over there?" addressed to a white person by the conductor of a street car who points to the seats reserved for negroes, is but little less so. In either case, and whether the language used be heard by others or not, an action in damages will lie against the carrier. *May vs. Shreveport Traction Co.*, 127 La. 420 (53 Sou. 671).

Where the checks of a depositor, not a merchant or trader, on a bank were refused payment and protested for want of funds, when in fact the depositor had funds in the hands of the bank more than sufficient to pay said checks, the depositor will be entitled to recover such actual damages, general or special, as may be by him alleged and proved. *Spearing vs. Whitney-Central Nat. Bank*, 129 La. 607 (56 Sou. 548).

Sawmill Accidents.

An inexperienced employee should not be sent to do work where there is danger without instructions enabling him to guard against danger. Pipes subject at times to heavy pressure from escaping steam should be screwed on

the boilers with special attention and care. *Bonnin vs. Town of Crowley*, 112 La. 1025 (36 Sou. 842).

Even in case of fellow-servants, the master is liable when his own negligence contributed to the injury; as, where an employee in a sawmill carelessly pitched a shovel, which rebounded, struck and released an unsafe wooden latch holding the lever which controlled the operation of the carriage. *Payne vs. Georgetown Lbr. Co.*, 117 La. 983 (42 Sou. 475).

Where a boy fourteen years of age is employed in a woodworking mill and factory, under an agreement with his father that he is not to work about the engine or dangerous machinery, and he is afterwards charged with a duty that requires him to go on a platform which was built "with the idea that no one would be allowed there except those who were competent and experienced in machinery," and which is unnecessarily dangerous, the employer is liable, and would be liable even though there had been no understanding with his father. *Bourg vs. Brownnell-Drews Lbr. Co.*, 120 La. 1010 (45 Sou. 972).

False Imprisonment.

False imprisonment is, in its nature, closely allied to malicious prosecution. Two things are essential: First, the detention of the person; second, the unlawfulness of the detention. It is not necessary that the unlawful act should be committed with malice or ill-will. Consequently, the question of malice is immaterial, except as it may affect the question of damages. *Wells vs. Johnson, Sheriff, et al.*, 52 La. An. 714 (27 Sou. 185).

Citizens are protected by the Constitution from warrants of arrest for crime issued against them without probable cause, and they are entitled to recover damages from parties causing such warrants to issue. It is not necessary for such recovery that the arrest should have been actuated by malice in the sense of the personal ill-will towards or desire to injure the party charged. The absence of such malice only affects the character and quantum of damages. *Lange vs. I. C. Ry. Co.*, 107 La. 687 (31 Sou. 1003).

Employing a Servant From Another.

With reference to a civil wrong giving right to a civil action without a preceding conviction, under the doctrine of Art. 2315, the Court held that employing a laborer al-

258 ART. 2315—EMPLOYING SERVANT FROM ANOTHER.

ready employed by another person will not create a liability on the part of the one employing him unless it is done with some degree of threat, fraud, falsehood, deception or benefit. *Kline vs. Eubanks*, 109 La. 241 (33 Sou. 211).

Where a commercial traveler engaged his services to the plaintiff for the term of one year, and when about one-half the term had expired sought other employment, and engaged his services to the defendant company, which at the time had no information that his term would not expire for five or six months, and when, after he had quit the service of the plaintiff, they informed defendant company of the terms of the contract, and thereupon the employee offered to release his employers, but at the same time expressed his determination not to return to the plaintiffs: *Held*, that plaintiffs have no cause of action because defendant did not release or discharge the employee. *Wolff & Sons vs. N. O. Tailor-Made Pants Company*, 113 La. 388 (37 Sou. 2).

Boiler Explosions and Accidents.

Plaintiff's minor son, a day laborer, was accidentally killed while engaged in the service of defendant, assisting in the work of placing in position a heavy steam boiler. It is shown that, with proper appliances, skill and care, the work could have been done in safety. Because of the want of these, defendant is liable. *Kimbell vs. Homer Compress & Mfg. Co.*, 109 La. 963 (34 Sou. 39).

In an accident of this kind, which ordinarily does not occur when due care has been exercised, plaintiff need not allege nor prove the particular acts of omission or commission from which the accident resulted; but the accident itself makes out a *prima facie* case, casting on the defendant the burden to show absence of negligence; and this rule is peculiar to boiler explosions. *Lykiardopoulos vs. New Orleans & C. R. L. & P. Co.*, 127 La. 310 (53 Sou. 575).

Miscellaneous Torts.

A rifle club is liable for injury to outside persons resulting from target practice on its premises. *Simmonds vs. Southern Rifle Club*, 52 La. An. 1116 (27 Sou. 656).

The defendant requested the deceased to come into her yard, and, after she had complied with the request, defendant did not protect her from the attack of her savage dogs. She is, therefore, responsible for the injury which the dogs

inflicted. Although an owner is not responsible for a *vis major*, still he is chargeable with the least fault. *Delisle vs. Bourriaque*, 105 La. 78 (29 Sou. 731).

Suit was brought against a telegraph company for failure to deliver a message to a mother announcing the mortal illness and approaching death of a son. The suit was dismissed on an exception of no cause of action for the reason that "mental pain and anguish resulting from simple actionable negligence is not sufficient basis for an action for damages if unattended by injury to person, property, health or reputation," in the Court of Appeal. The exception should have been overruled. Under the laws of Louisiana, it is not well grounded. *Graham vs. W. U. Tel. Co.*, 109 La. 1069 (34 Sou. 91).

It is negligence for the driver of a team of horses to abandon his seat upon the box and his hold upon the reins, and to leave his team standing in a frequented place; and, where it appears probable that they might have been controlled if he had been in the proper position to control them, his employer will be held liable in damages for injuries inflicted by them upon a third person in running away. *Zambelli vs. F. Johnson & Sons Co.*, 115 La. 483 (39 Sou. 501).

Where a party not in actual possession, but claiming to be the owner of certain real estate, brings suit against another not in actual possession, alleging that the latter has inflicted injury upon him by destroying the recorded evidence of his title, and by causing to be inscribed in the public records a pretended and fraudulent adverse title, he has a standing in court; and, if his allegations be sustained by proof, is entitled to damages, though his action be not specifically classified by the Code of Practice. *La Croix vs. Villo*, 123 La. 459 (49 Sou. 20).

It is gross negligence for the authorities of a municipal corporation to allow a sidewalk, composed of wooden stringers laid upon the ground in rows parallel with the line of the street, with planks nailed upon them crosswise, to fall into such a condition that some of the planks are missing, leaving holes in their stead, and others are loosened from the stringers, so that they are liable to tilt and shift their position, and others are so rotten that they break when trodden upon; and it is not such contributory negligence as will preclude the recovery of damages for injury where it appears that the person charged with such contributory negligence, seeing a hole left by a missing plank, and seeing

upon the farther side of the hole a plank apparently sound, steps across the hole on to the plank, and is precipitated to the ground by the breaking of the plank, which proves to be rotten. *Roberson vs. Town of Jennings*, 128 La. 796 (55 Sou. 375).

The owner of adjoining property is responsible in damages for every act of his which causes damage to his neighbor. (Arts. 667, 2315, 2316, 2317.) The contractor who executes the work for the owner is bound *in solido* with him when they are joint tortfeasors. *Egan vs. Hotel Grunewald Co.*, 129 La. 163 (55 Sou. 750).

Refer to Arts. 1934, 1969, 2316, 2317, 2318, 2320, 2321, 2747, 2750.

Art. 2316. See Art. 2315, 105 La. 82, 112 La. 768, 115 La. 486, 117 La. 990; Art. 667, 129 La. 163.

Advice of counsel in certain cases under certain circumstances gives a qualified protection to their clients in cases of torts, but not to the extent of enabling them to escape liability, though client and counsel are negligent or indifferent to consequences. *Lange vs. I. C. Ry. Co.*, 107 La. 687 (31 Sou. 1003).

Plaintiffs do not base their action exclusively on Art. 2695, nor upon a contract of lease. The action is one *ex delicto* for injuries to the wife, and for incidental damages to the husband arising therefrom. The right of the wife to damages for personal injury to herself is distinct from that of the husband to recover damages by reason of his contractual relations with his lessor. The lease evidenced the right of the wife to have been lawfully upon the premises where she was injured. *Schoppel vs. Daly*, 112 La. 202 (36 Sou. 322).

The owner of a wharf which has collapsed while being put to the use for which it was intended is responsible in damages to those who were legitimately on it at the time and were injured. It makes no difference that the person injured was on the wharf as a guest or visitor of the lessee of the wharf. *Cristadoro vs. Von Behren's Heirs*, 119 La. 1025 (44 Sou. 852).

Refer to Arts. 2322, 2695.

Art. 2317. See Art. 667, 129 La. 163; Art. 2316, 52 La. An. 1116, and 112 La. 768.

Under the orders of the foreman in charge of the construction of defendant company's line in the field, an acci-

dent happened to plaintiff, who was not himself at fault. The employment of men to work under the former was virtually under the latter's control. He had employed the plaintiff. *Held*, that he was not the fellow-servant of the plaintiff. *Vicars vs. Telephone & Telegraph Co.*, 52 La. An. 2157 (28 Sou. 367).

The danger was not open and apparent, and plaintiff, as a workman in charge of the winch, requiring all his time and attention, did not have opportunity to be informed of the danger. The foreman the day previous had inspected the appliance. He did not have the block taken down or moused on the day following, when his attention was directed to the danger. The rule is general that the master is responsible for any act of omission or commission of his agent causing damages while acting in the scope of his employment. He, although he may not be present in person, is, as relates to management and discipline, ordinarily needful, as far as reasonably possible, to avoid casualties. *Ander vs. Elder Dempster & Co.*, 105 La. 673 (30 Sou. 120).

A railroad corporation, by its very incorporation under the laws of the State, assumes as one of its primary obligations that it shall operate the road under such conditions as to properly secure the safety of the general public. It is liable for injuries to persons caused by the wrongful or negligent operation of the cars upon the road, whether operated by itself or by another corporation, to which it had leased it. *Muntz vs. A. & G. Ry. Co.*, 111 La. 423 (35 Sou. 624).

Refer to Art. 2679.

Art. 2318. See Art. 2315, 105 La. 82.

While the father may be liable for the wrongful act of his minor son, it must be shown, in order to render him liable, that the one who had a difficulty with the son was not himself at fault in the trouble which resulted injuriously to the claimant for damages. *Miller vs. Meche*, 111 La. 142 (35 Sou. 487).

Art. 2320. See Art. 2315, 117 La. 990.

Masters and employers are answerable for the damage occasioned by their servants in the exercise of the functions in which they are employed. It is negligence to drive into a vehicle while standing still on the side of the roadway when there is ample room to pass without colliding with it. *Odom vs. Schmidt*, 52 La. An. 2131 (28 Sou. 350).

Defendant's brakeman, instead of waiting a few moments to oust a trespasser after a stop of the train, chose to pelt him with rocks and clods to make him get off the rods where he was riding, stealing a ride, under the car. It was unnecessarily violent and illegal. The act of trespassing was not of itself contributory negligence justifying defendant's servant to resort to the acts he did. *Dorsey vs. Railway Co.*, 104 La. 478 (29 Sou. 177).

It is the duty of a corporation, when it employs inexperienced men and places them in a dangerous position directly under others having the direction and control of the dangerous appliances, to give the latter notice of the fact of such inexperience, and caution them as to the necessity of exercising special caution towards assuring their safety. *Evans vs. Louisiana Lbr. Co.*, 111 La. 535 (35 Sou. 736).

An authority to cause the arrest of a person on a charge of violating a labor contract is not implied in the employment of agents or clerks to run a commissary store, and, in connection therewith, to collect amounts due by laborers to a construction company. *Vara vs. R. M. Quigley Construction Co.*, 114 La. 261 (38 Sou. 162).

The asserted civil-law doctrine that a master without fault is liable for the negligence of a fellow-servant is recognized neither by the Civil Code nor the jurisprudence of Louisiana. Article 2320 of the Civil Code, in departing from the Code Napoleon, went towards the common-law doctrine of fellow-servants in a modified form. *Weaver vs. W. L. Goulden Logging Co.*, 116 La. 468 (40 Sou. 798).

The son of the plaintiffs was killed by being run over by a horse and vehicle recklessly driven by a man in the employ of the defendants. Plaintiffs charge that the act was committed by the employee while engaged in the exercise of the function in which he was employed. The employee was not engaged as a driver, but as a groom and stableman. Taking advantage of the absence of his employer from the city, he, for his own pleasure, and in disobedience of positive prohibitory orders given at the time of his employment, hitched the horse to a buggy and drove her outside of, and contrary to, the terms of his employment. Judgment for defendant. *Brenner vs. Ford*, 116 La. 550 (40 Sou. 894).

An attendant in a sanitarium should be careful, and it is the duty of those in charge to compel the nurse to be careful, and not neglect the patient, who is under the care

of the sanitarium, that medicines are properly administered. *Stanley vs. Schumpert*, 117 La. 255 (41 Sou. 565).

Plaintiff, an overseer on a sugar plantation, got into a difficulty with a laborer in the fields and was shot in the arm. He sued the common master for damages, alleging the servant a man of bad character. *Held*, that the overseer provoked the difficulty, the dangerous character of the servant was not known to the master, and that the act which occasioned the damage was not within the scope of the servant's employment. *Queen vs. Schwann*, 119 La. 495 (44 Sou. 276).

Under the settled jurisprudence of this State, the master is liable in damages to one servant injured through the negligence of another servant in the performance of different work under their common employment. *Taylor vs. E. C. Palmer & Co.*, 124 La. 531 (50 Sou. 522).

Art. 2321. See Art. 2315, 105 La. 83.

Plaintiff, while on a public street, was attacked, thrown down and his thigh bitten by a dog of defendant. *Held*, that it was necessary for defendant to show that the animal had always been of a kind temper, had never attempted to bite anyone, and had never given occasion to suspect that he would bite; and, failing to do so, the law presumes that the defendant was in fault in not confining the animal, which was a strange dog, to the premises. *Bentz vs. Page*, 115 La. 560 (39 Sou. 599).

It is negligence for the driver of a horse and cart to abandon his seat and hold on the reins, and to go chasing his hat in the street without fastening the animal; and, where a horse runs away, the owner will be held responsible for injury inflicted by the runaway's collision with a third person without contributory fault. The owner of an animal is responsible for the damage he has caused, and the burden is on the owner to prove that he was without the slightest fault and did all that was possible to prevent the injury. *Damonte vs. Patton*, 118 La. 530 (43 Sou. 153).

Where a horse attached to a wagon was left standing unhitched in a public street, and ran away and collided with the street car, whereby plaintiff was injured, the owner of the horse was liable for the damage caused, and the motor-man was not negligent for failing to bring his car to a full stop on seeing a wagon on the side of the street without a driver, where the horse takes fright and collides with the street car and a person, an employee thereon, is injured.

Trenchard vs. N. O. Ry. & Light Co., 123 La. 36 (48 Sou. 575).

Art. 2322. See Art. 2316, 119 La. 1025.

Art. 2324. See Morgan's L. & T. R. & S. S. Co. vs. Stewart, 119 La. 401; Kline vs. Eubanks, 109 La. 245; Schoppel vs. Daly, 112 La. 208.

The individual members of a firm are liable for the tort of one of the members of the firm, although they had no knowledge thereof, where such tort was committed in the course of the partnership business and for the benefit of the partnership. *Trust & Safe Deposit Co. vs. Investment Co. et al.*, 107 La. 251 (31 Sou. 736).

The conductor of a street car invited a police officer to come upon his car, saying there was a pickpocket on it. The policeman arrested the passenger, marched him through the crowd, and sent him in a patrol wagon to the station, where he was detained and then released without any charge being preferred against him. He was shown to be a man of good character and position. The defendant is liable in damages. *Schmidt vs. N. O. Railway Co.*, 116 La. 311 (40 Sou. 714).

A tax sale of community real estate will be annulled as a fraud on the heirs of the wife where it is shown that the purchaser, an employee in the office of the Tax Collector, colluded with the surviving husband to have the property sold for taxes under an agreement to pay the surviving husband the full value of the property after the acquisition of the tax title. *Babbin's Heirs vs. Daspit*, 120 La. 758 (45 Sou. 598).

Under the allegations of the petition, the firm is liable for damages occasioned by the negligence of its servants, and the oil company is liable on an implied promise to pay the debts of the partnership. The one is bound in tort, and the other is bound by contract. There can be no joint obligation without a joint contract. Wrongdoers are bound *in solido*. If the oil company had given the plaintiff a written promise to pay all the damages occasioned by the fire in question, suit could not have been brought thereon against the oil company outside of the parish of its domicile. *Police Jury vs. T. & P. Ry.*, 122 La. 391 (47 Sou. 692).

Art. 2327. See Art. 216, 121 La. 93.

Art. 2329.

This article was amended by Act No. 236 of 1910, p. 400, to read as follows: Every matrimonial agreement can be altered by the husband and wife jointly before the celebration of the marriage; but it cannot be altered after the celebration. Provided, that, in the case of married couples removing to this State, and settling therein, from other States and countries, after marriage, they shall have the right at any time within one year after the passage of this act, or a like period after such settlement in this State, to make a valid marriage contract, subject in all other respects to the laws of this State.

Art. 2334.

Article 2334 was amended by Act 170 of 1912, as follows:

The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly.

The earnings of the wife when living apart from her husband, although not separated by judgment of the Court; her earnings when carrying on a business, trade, occupation or industry separate from her husband; actions for damages resulting from offenses and quasi-offenses, and the property purchased with all funds thus derived, are her separate property.

Common property is that which is acquired by the husband and wife during marriage in any manner different from that above declared. But when the title to community property stands in the name of the wife it cannot be mortgaged or sold by the husband without her written authority or consent.

Art. 2335. See *Grandchamp vs. Billis' Heirs*, 121 La. 348.

Art. 2336.

A married woman who makes a nuncupative will by public act, which recites that certain property acquired during the marriage in the name of the husband is his separate property, is not thereby estopped to assert the contrary.

Property purchased by the husband during the community is presumed to have been acquired for the community unless the husband, at the time of the purchase, clearly manifested the intention to acquire for his own account. *Succession of Muller*, 106 La. 89 (30 Sou. 329).

Art. 2338. See *Grandchampot vs. Billis' Heirs*, 121 La. 348.

Art. 2341. See Art. 918, 129 La. 80.

Art. 2357. See *Female Orphan Society vs. Y. M. C. A.*, 119 La. 283.

Art. 2361.

The right of the wife to invest or reinvest her paraphernal effects is derived from liberal interpretations given to Arts. 2361 and 2367. *Jordy vs. Muir*, 51 La. An. 59 (25 Sou. 550).

Refer to Art. 2367.

Art. 2367. See Art. 2361, 51 La. An. 59.

Art. 2374.

As the legality of the wife to acquire during marriage property in her own name and for her separate account is, in our jurisprudence, an exception to the general rule, it must, therefore, be strictly and rigidly construed; and the wife is required, not only to prove that she had paraphernal effects at her disposal, but also that they were ample to enable her to make the new acquisition; otherwise, the contract will be treated as a contract of community. *Jordy vs. Muir*, 51 La. An. 59 (25 Sou. 550).

Art. 2378.

It is a legal right which the wife has to accept the succession in any manner under the conditions imposed by law. From whatever cause the wife forfeits the right of renouncing the community, she can be made responsible for only one-half of the debts contracted during the marriage. *Martin Davie & Co. vs. Carville*, 110 La. 870 (34 Sou. 807).

Art. 2382.

If the husband dies owning considerable property, and leaves his wife in necessitous circumstances, she is entitled to the marital fourth in usufruct; but any legacy left to her by her husband, or means for her support provided for

her by him, amounting to less than one-fourth of his estate, must be deducted from the amount left to his widow in usufruct. *Dupuy vs. Dupuy, Adm., et al.*, 52 La. An. 869 (27 Sou. 287).

The General Assembly, in enacting Art. 3252, whereby the widow is entitled to recover one thousand dollars from the succession of her husband, never contemplated or intended that this assistance should be extended adversely to his creditors, or to his heirs at law, or to an unfaithful wife who abandoned her husband. The same applies to Art. 2382. *Richard vs. Lazard*, 108 La. 541 (32 Sou. 559).

A married person leaving an estate less than \$500 cannot be said to have died rich within the meaning of the Code. *Crockett vs. Madison*, 118 La. 728 (43 Sou. 388).

Her right is not affected by the facts that, in deference to the wishes of her husband, the marriage was not made public, that she continued to bear her maiden name, and to live where she had lived, and that he visited her only three or four times a month. *Succession of Pelloat*, 127 La. 873 (54 Sou. 132).

Refer to Art. 3252.

Art. 2383.

But to maintain the wife's title to property bought by her during the marriage she must prove that such purchases are made with the paraphernal funds not under the husband's administration. (C. C. 2383, 2384, 2390, 2400.) *Jordy vs. Muir*, 51 La. An. 63 (25 Sou. 550).

The succession of the deceased being valued at \$13,000, and his surviving widow having received \$1,800 in cash on insurance policies in her favor at his death, she was not left in necessitous circumstances entitling her to claim the marital fourth of his estate. *Dupuy vs. Dupuy, Adm., et al.*, 52 La. An. 869 (27 Sou. 287).

Refer to Arts. 2384, 2390, 2400.

Art. 2384. See Art. 2383, 51 La. An. 63.

Art. 2386. See Voiers vs. Atkins Bros., 113 La. 328.

Where a person mixes his own affairs with those of another person, and subsequently seeks to hold the other responsible for matters resulting from such mingling, he must establish that the claim made by him rests upon the affairs of that other. Debts of the wife paid during the marriage are presumed to have been paid by her if during the mar-

riage she receives moneys from inheritances falling to her. If those moneys have passed into the possession and under the control of her husband, those debts are presumed to be paid by him for her out of those funds, rather than out of the funds of his own. *Succession of Barrow*, 118 La. 1031 (43 Sou. 667).

A community which has been dissolved, or which has never come into existence, cannot be re-established. Even if, under Art. 2386, the proceeds of a wife's separate property, coming into the husband's hands, may be enjoyed by him, it does not follow that he can recover them when they have not yet reached his hands. *American Hoist & Derrick Co. vs. Frey*, 127 La. 184 (53 Sou. 486).

Where there is no community, the husband is not responsible for the income of the separate property of the wife not administered by her alone, collected and used by him. Where the wife has not reserved to herself the administration of her separate estate, she is not bound to contribute to the expenses of the marriage. (Arts. 2386, 2396.) *Crochet vs. Dugas*, 126 La. 285 (52 Sou. 495).

Refer to Art. 2396.

Art. 2387.

Where part of such estate is represented by notes of the husband, secured by mortgage upon his separate property, which were acquired by the wife before the marriage, she is entitled, in resuming the administration of her personal property, to recover the amount of the face of the notes, with interest, as stipulated, up to the date of her marriage, and with like interest from judicial demand. *Bordes, Wife, etc., vs. Duprat*, 52 La. An. 306 (26 Sou. 821).

Refer to Art. 2390.

Art. 2389. See Voiers vs. Atkins Bros., 113 La. 327.

Where the husband, for the community, cultivates a plantation, the separate property of the wife, the indebtedness incurred in such cultivation is a liability of the community, and the wife cannot be individually held for same. This includes the ordinary repair account of the plantation, but does not include improvements of a circumstantial nature. The wife is liable for the cost of betterments, whether she retains the administration or not. *Courrge vs. Colgin*, 51 La. An. 1072 (25 Sou. 942).

Refer to Arts. 2395, 2425.

Art. 2390. See Art. 2383, 51 La. An. 63; Art. 1746, 106 La. 689.

A married woman may, with the authorization of her husband, sell her paraphernal property and make use of the proceeds as she thinks proper. The law contemplates that she may turn them over to her husband, and provides a method by which she may secure herself in so doing; and it does not affect the validity of the sale that she announces such purpose in advance. *Caldwell vs. Trezevant*, 111 La. 410 (35 Sou. 619).

Refer to Art. 2397.

Art. 2391. See Art. 2387, 52 La. An. 308.

Art. 2395. See *Voiers vs. Atkins Bros.*, 113 La. 327; Art. 2389, 51 La. An. 1072.

Art. 2396. See *Voiers vs. Atkins Bros.*, 113 La. 328; Art. 2386, 126 La. 286.

Art. 2397. See Art. 1746, 106 La. 689; Art. 2390, 111 La. 414.

Art. 2398. See Art. 2221, 51 La. An. 1460; Art. 126, 111 La. 415; Art. 127, 128 La. 262.

The property incumbered by mortgage in favor of others may be the subject of a *dation* to the wife by the husband in satisfaction of her paraphernal claims, provided she does not assume to make herself responsible for the mortgage debts. *Colvin vs. Sheriff et al.*, 104 La. 655 (29 Sou. 274).

A sale made by a married woman with the authorization of her husband for the recited consideration of a price paid cash by the vendee to a third party acting in good faith on the faith of the public records is protected from a rescission by the wife of the original sale on the ground that it was not really a sale, but the taking up of her mortgage securing her husband's debt executed under marital influence, coercion and fraudulent representations of her husband. *Colgin vs. Courrege*, 106 La. 684 (31 Sou. 144).

It is settled jurisprudence in Louisiana that laws regulating the privileges and prescribing the disabilities of married women are personal statutes, purely domiciliary in char-

acter, and do not operate to the benefit of married women domiciled elsewhere than in Louisiana. *Marks vs. Germania Savings Bank*, 110 La. 659 (34 Sou. 725).

A married woman cannot bind herself as surety for her husband on an appeal bond. (Arts. 1790, 2398.) *Succession of Maloney*, 124 La. 672 (50 Sou. 647).

Art. 2399. See Art. 2162, 107 La. 433.

Art. 2400. See Art. 2383, 51 La. An. 64.

A claim for damages *ex delicto* arising from a tort or trespass upon the person of a married woman, while temporarily sojourning in the State of Louisiana, whose residence was in the State of Mississippi, cannot be considered as properly acquired in the former State in the sense of its community statute; and being completely capacitated, under the law of Mississippi, to institute suit and stand in judgment therefor in the courts of that State, she has like capacity to sue in her own name in a Louisiana court. *Williams vs. Pope Mfg. Co.*, 52 La. An. 1417 (27 Sou. 851).

The validity of the conveyance of immovable property in Louisiana, and the capacity of a husband and wife to deal with each other with respect thereto, are to be determined by the law of Louisiana. *Rush et al. vs. Landers*, 107 La. 550 (32 Sou. 95).

Art. 2401. See Art. 915, 118 La. 215.

Art. 2402. See Art. 1746, 118 La. 58.

This article was amended by Act 68 of 1902, p. 95, which added the following to it: But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate of the wife and recoverable by herself alone; provided, where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws.

The earnings of the wife not separate in property fall into the community, and the debts incurred by the spouses are community debts; hence, payments of the credit installments of the price from such resources would not aid her pretensions in this controversy that the property was paraphernal. *Jordy vs. Muir*, 51 La. An. 64 (24 Sou. 604).

The community is not entitled to charge the husband with the amount of the civil rents of his paraphernal property which he has applied during his second marriage to the payment of an interest-bearing mortgage debt which existed on the property at the time of his marriage. *Sharp vs. Zeller*, 119 La. 61 (34 Sou. 129).

The homestead becomes the joint property of the husband and the wife if the community of acquests and gains existed between them at the time of entry, even though the proof were made and the certificate and the patent issued only after the dissolution of the community by the death of the wife. *Crochet vs. McCamant*, 116 La. 1 (40 Sou. 474).

Under the law as it now stands, damages resulting from personal injuries to the wife do not fall into the community, but inure to her separate benefit; and the action for their recovery should be brought by the wife, with the usual authorization of the husband or Court. "Personal injuries" are not confined to physical injuries to the person of the wife, but extend to injuries to her feelings resulting from abuse, slander or libel. *Martin vs. Derenbecker*, 116 La. 495 (40 Sou. 849).

But where the suit is brought by the husband in his name under allegations that show the object is to recover damages for personal injuries inflicted on the wife, and no want of capacity in the husband to sue is seasonably raised, a judgment may properly be rendered for damages; and, when rendered, the same will be the property of the wife. *Harkness vs. L. & N. W. Ry.*, 110 La. 822 (34 Sou. 791).

It is equally clear that the money and checks donated to K individually became his separate property. It is only the joint donation that inures to the benefit of the community. *Succession of Desina*, 123 La. 483 (49 Sou. 23).

Her voluntary judicial admissions contradict the recital of the deed of purchase that the property was paid for with her separate paraphernal funds. On the law and the facts, the property, although purchased in her name, fell into the community. *Succession of Hostetter*, 128 La. 471 (54 Sou. 961).

The presumption that the property bought in the name of the wife belongs to the wife is *merely prima facie*; and the wife may prove by parol evidence that the purchase was made with her separate funds, although the act of sale contains no such recital. The wife's *title* to the property stand-

ing in her name, and by her conveyed to a third person, cannot be assailed by such person in a suit against the husband alone. *Clarke vs. Lassus*, 128 La. 919 (55 Sou. 576).

The right of action conferred upon a married woman by Act 68 of 1902 includes the right to recover for injuries to feelings as well as physical injuries. Hence, a married woman whose child loses its life through the fault of another may recover by herself alone for mental suffering caused by such death, and the amount recovered becomes her separate property. *Robertson vs. Town of Jennings*, 128 La. 796 (55 Sou. 375).

Unless a husband, living with his wife under the régime of the community, when purchasing property with his separate funds, manifests a distinct and clear intention to invest such funds for his separate account, the property so purchased falls into the community, and he becomes a creditor of the community for the amount of his separate funds so invested, which amount does not, however, include funds derived by him as revenue from his separate property. *McWilliams vs. Stair*, 128 La. 752 (55 Sou. 343).

A husband may make a payment to his wife in satisfaction of her paraphernal claim, to the prejudice of his other creditors, to the extent of his indebtedness to his wife; but any payment is subject to the scrutiny of the Courts at the suit of other creditors. *Lehman Dry Goods Co. vs. Lemoine*, 129 La. 383 (56 Sou. 324).

Art. 2403. See Art. 2402, 51 La. An. 64; Art. 397, 52 La. An. 1879, and 104 La. 534.

Art. 2404. See Heard vs. Blanks, 125 La. 115.

The administrator is expected to make truthful allegations. The property was community, represented by the administrator. The husband was absolutely bound for the payment of the debts; and, if he has failed in duty as relates to the debts, he, as administrator, is responsible on his bond. *Irwin vs. Flynn*, 110 La. 834 (34 Sou. 794).

Where the husband and wife are improperly joined as plaintiffs in an action for damages to the wife, and the defendant interposes an exception of misjoinder, which is practically sustained by the exclusion of the wife's testimony and rendition of a judgment in favor of the husband, the judgment so rendered may be affirmed with the reservation

that the proceeds are to be collected by, and are to inure to the separate use and benefit of, the wife. *Martin vs. Derenbecker*, 116 La. 495 (40 Sou. 849).

The husband can make no conveyance *inter vivos* of the immovables of the community by a gratuitous title, unless it be for the establishment of the children of the marriage. The pretended purchaser in a sham sale has no standing to urge that the judgment of nullity should be restricted to the half interest of the wife in the property, especially when the administrator of the husband's succession had joined in the demand of nullity. A sham sale produces no legal effect. *Radovich vs. Jenkins*, 123 La. 355 (48 Sou. 988).

The husband, as head and master of the community, may sell the homestead without the consent of the wife. *Nona Mills Co. vs. Swain*, 125 La. 233 (51 Sou. 128).

Art. 2405. See Art. 2402, 129 La. 394.

Where a married woman, not separate in property, is engaged in trade, she is presumed, in the absence of proof to the contrary, to trade on the funds of the community; and assets in her hands are those of the community. *Succession of Manning vs. Burke*, 107 La. 456 (31 Sou. 862).

Where, in a suit by a widow claiming an interest in community property, a defendant admitted that the property was acquired during the marriage, the cause was not tried on the issue whether the property was community property. The Court on appeal would act on the presumption that all property possessed by either spouse at the dissolution of the community belongs to the community. *Rocques vs. Freeman*, 125 La. 60 (51 Sou. 68).

Art. 2408. See Sharp vs. Zeller, 110 La. 70.

We think the District Court was right in taking, as the date for estimating value of the property expropriated for railroad purposes, that of the institution of the expropriation suit, withdrawing, however, from the value so ascertained, so much of the same as was the result of the construction. *L. R. & N. Co. vs. Xavier Realty Co.*, 115 La. 342 (38 Sou. 1008).

Improvements placed by the community upon the property of one of the spouses belong to the owner of the soil, who, or whose estate, becomes liable to the community to the extent of the enhanced value of the property, resulting

from such improvements, at the date of the dissolution of the community. *Dillon vs. Freeville*, 129 La. 1006 (57 Sou. 316).

Art. 2409. See Art. 397, 104 La. 534.

Art. 2415. See Art. 2255, 106 La. 159.

Art. 2418.

While a surviving wife, by failing to have the succession of her husband opened, or by failing to avail herself of the benefit of inventory, by taking possession of the property of the succession, by recognizing and paying debts, and by continuing her husband's store, has committed herself to an unconditional acceptance of the community, she does not, however, render herself liable to each individual creditor of the community for the payment of his debt in entirety. Each creditor can recover from her under her status as "widow in community" only one-half of this debt. Had it been alleged and shown that she was in actual possession of specific property on which the creditor had a privilege or mortgage, she might have been proceeded against, under proper pleadings, to surrender the property or made to pay the debt in its entirety. *Martin Davie & Co. vs. Carville*, 110 La. 862 (34 Sou. 807).

Art. 2419. See Art. 1305, 109 La. 158.

Art. 2425. See Pelletier vs. State Nat. Bank, 117 La. 342; Art. 2389, 51 La. An. 1072.

Articles 2425 and 2446 provide when the wife may obtain a separation of property from her husband, and authorize the husband to transfer property to his wife as *dation en paiement*, whether they be separate in property or not; and it is the settled jurisprudence not only that these provisions take the *dation en paiement*, made by the husband in insolvent circumstances in payment of the claims of his wife, out of the rule as laid down in Art. 1984, but that it is the obligation and duty of the husband to see that the wife is protected; and the greater the danger that his estate will be absorbed by other creditors the greater the obligation on his part to see that she is paid by preference. *Compton vs. Dietlein & Jacobs*, 118 La. 364 (42 Sou. 964).

It has long been settled that the wife may obtain the separation of property provided for by Art. 2425 for causes other than those specified in that article; and we are not prepared to say that, on proof that the husband was of a speculative disposition, a case might not be made out of danger to the dotal and paraphernal rights of the wife which would entitle her to such separation. *Jones vs. Jones*, 119 La. 687 (44 Sou. 429).

Refer to Arts. 2427, 2428, 2429, 2446.

Art. 2427. See Art. 2425, 119 La. 687.

An agreement between husband and wife to put an end to the community of acquests and gains existing between them is a nullity. Though put in the form of a judgment rendered at the suit of the wife, followed by a notarial act of settlement between the parties, and of renunciation of the wife, the wife may sue to have it set aside. *Driscoll vs. Pierce*, 115 La. 156 (38 Sou. 949).

Art. 2428. See Art. 1900, 112 La. 280; Art. 2425, 119 La. 689.

The husband may lawfully convey property to his wife in payment of her just paraphernal claims, whether there be a separation of property between them or not; and the law obliges him to warrant the title against prior mortgages on the property when the transfer is not made subject to mortgages and liens. *Pons vs. Y. & M. V. Ry. Co.*, 122 La. 157 (47 Sou. 449).

Refer to Arts. 2446, 2501, 3330.

Art. 2429. See Art. 2425, 119 La. 689.

Art. 2430. See Art. 2221, 51 La. An. 1462.

Art. 2432. See Art. 1398, 120 La. 222.

Art. 2434. See Pelletier vs. State Nat. Bank, 117 La. 341.

Under this law, it is as imperatively necessary for the wife to prove the condition of her husband's affairs, "which induces her to believe that his estate may not be sufficient to meet her rights," as it is for her to allege such condition; and such is the jurisprudence of this Court. *Jones vs. Jones*, 119 La. 689 (44 Sou. 429).

Art. 2435. See Voiers vs. Atkins Bros., 113 La. 327.

While it is true that the husband, so long as the marriage continues, is, in one sense, "the head of the family," it does not follow that the burden and duty of supporting the family does not, under some circumstances, rest upon the wife. The fact, with its legal consequences, is not affected because the husband may give his time and attention to the conducting of the wife's business. *Ginsberg vs. Groner*, 117 La. 269 (41 Sou. 569).

Art. 2436. See Art. 2437, 108 La. 144.**Art. 2437.**

The Courts are without jurisdiction to grant to persons not residing within the limits of the State a decree of separation of property. The wife has not complied with Art. 2437. She has never returned to the place of matrimonial domicile, and, therefore, cannot stand in judgment. The presence of the husband temporarily is not the presence contemplated by the article cited to enable the wife to sue. One who tenders title conveying property should tender a title not suggestive of future litigation. *Carter vs. Improvement Assn., Ltd.*, 108 La. 143 (32 Sou. 473).

Refer to Art. 2436.

Art. 2438. See Art. 2531, 114 La. 502.**Art. 2439. See Art 2255, 106 La. 158; Art. 1764, 107 La. 405; Art. 1779, 111 La. 819; Art. 1801, 114 La. 245; Arts. 1935 and 2462, 116 La. 341; Art. 1926, 117 La. 283; Art. 2021, 121 La. 153; Art. 2275, 121 La. 595.**

When all the essential elements and conditions for an absolute sale are present in a contract between the parties, the effects flowing legally from that contract follow whether the parties foresaw and intended them or not, and though they may refer to the contract as an agreement to sell, and not a sale. *State ex rel. Buckley et al. vs. Whited & Wheless, Ltd.*, 104 La. 125 (28 Sou. 922).

The parties intended that Williams should at once become the owner of all the cypress trees; and, if he failed to remove them in the time specified, then the ownership of the trees should again be vested in the G. Company; and, third,

that the said G. Company should be responsible for the bare lands made the subject of this contract. The parties knew that this valuable cypress was subject to taxation, either as movables or as part of the realty to which it was attached; and, if the G. Company was only to be liable for the taxes on the bare lands, it was Williams' duty to pay the taxes on the cypress. The contract between Williams and G was an absolute sale of all the cypress trees on the lands described, there being the thing sold, the price and the consent. The sale was in lump (Art. 2459), and the delivery constructive (Art. 2478). *Williams vs. Sheriff & Tax Collector*, 107 La. 98 (31 Sou. 962).

The city is not even in possession, actual or constructive, of the markets. True, the third section of the ordinance declares that, as a consideration for the franchise to be granted, the adjudicatee should, on completion of the market-house, convey the property to the city; and this was done, and the fee may be said to be conditionally in the city; but this conveyance to the city is not a sale, because it lacks the essential of a certain and fixed price in current money. *Maestri vs. Board of Assessors*, 110 La. 520 (34 Sou. 658).

As between the parties to a private sale, the following is a sufficient description: "The property and all improvements thereon, situated in the square bounded by St. Louis, Toulouse, Rampart and Basin Streets, and known as 500 to 506 Basin Street." *Girault vs. Feucht*, 117 La. 276 (41 Sou. 572).

An agreement for the sale of real estate which contemplates the passing of property, not immediately and by virtue thereof, but by an act to be executed at a later date, and which, in other respects, contains the elements essential to a sale, is a promise of sale; and, when made with the giving of earnest, may be receded from by either of the parties; "he who has given the earnest by forfeiting, and he who has received it by returning the double." *Smith vs. Hussey*, 119 La. 32 (43 Sou. 902).

Plaintiff placed in the hands of one Moss certain jewelry with the right to sell the same under an obligation to pay them a certain amount fixed at the time. Moss sold to Fink one set of earrings and received the price. The other set Moss transferred to Fink under *dation en paiement*. F. & Co. brought suit to recover and have delivered to them the jewelry, and, on default of Fink so to do, to recover

the price fixed between the parties. The Court of Appeal gave judgment for defendant. *Held*, that it was correct as to the jewelry which was sold to Fink, but erroneous as to the jewelry which was transferred to him under the *dation en paiement*. *Wm. Frantz & Co. vs. Fink*, 125 La. 1013 (52 Sou. 131).

Refer to Arts. 2440, 2456, 2459, 2462, 2463, 2478.

Art. 2440. See Art. 2246, 107 La. 491; Art. 471, 109 La. 764; Art. 2236, 110 La. 1076; Art. 1801, 114 La. 245; Art. 2239, 116 La. 1070; Art. 1926, 117 La. 283; Art. 2439, 119 La. 36; Art. 2275, 121 La. 595.

It is well settled that, where the understanding of the parties is that their contract shall be reduced to writing, the reduction to writing stands as a condition precedent to the perfection of the contract, and either party is at liberty to retire from the contract so long as the reduction to writing has not taken place; but there is nothing in this which prevents a *licit* future contract. *Kaplan vs. Whitworth*, 116 La. 337 (40 Sou. 723).

Refer to Arts. 2240, 2463.

Art. 2442. See Arts. 1777 and 774, 107 La. 775.

Art. 2443. See Arts. 343 and 495, 124 La. 238.

A and B own each an undivided half of certain property. They executed their solidary promissory note, secured by a special mortgage upon the entire property. The debt was in reality A's debt only to the extent of one-half. He paid that half, leaving the balance due the debt in reality of B. He not paying it, the creditor obtained a judgment *in solido* against both parties, and caused the entire property to be seized and sold, A becoming the adjudicatee and paying the entire debt. One-half of the bid more than sufficed to pay the judgment creditor in full. Payment of this judgment should be made from half of the price representing B's half of the property, and the half representing A's half should be returned to him by the Sheriff, B's creditors having no claim upon that portion of the price, but being limited to the balance remaining of B's portion after payment of the seizing creditor. *Stubbs vs. Lee*, 105 La. 642 (30 Sou. 169).

A seized debtor who becomes the adjudicatee at a Sheriff's sale made of his own property, and pays the Sheriff the amount of the bid, acquires no new title. *Scott vs. Leonard et al.*, 106 La. 317 (30 Sou. 841).

Art. 2444. See Art. 2239, 124 La. 429; Art. 1248, 129 La. 973.

Where a father over seventy years of age, of simple taste and frugal habits, and without debts, transfers all of his property in the form of a sale for a large amount to one of his sons, who has always attended to his business, and matters remain as they were, the father occupying the property, and prior contracts of tenants continuing unchanged, and where, at the death of the father, the alleged price has disappeared, and the son disavows all knowledge on the subject, it will be presumed that the act did not evidence a real sale, but was resorted to in order to deprive the other children of their legitime. *Barras vs. Barras*, 111 La. 285 (35 Sou. 553).

An action by a forced heir to set aside a conveyance of real estate, made by his ancestor to other forced heirs, on the ground that it was simulated, or a donation in disguise, or, in the alternative, on the ground that the consideration was inadequate, and that the property should be held subject to collation, cannot be converted, at the instance of the plaintiff, and merely by an answer to an appeal taken by defendants, into an action to set aside the conveyance on the ground of lesion beyond moiety. *Champagne vs. Champagne*, 125 La. 408 (51 Sou. 440).

Art. 2445. See Art. 1470, 51 La. An. 1663.

As undertutors are not interdicted from buying property in which minors to whom they are appointed may have an eventual interest, it follows that the question whether such a purchase made by an undertutor in a particular case is valid or invalid will depend upon the circumstances of the case rather than upon the mere official relationship of minor and undertutor. *Smith vs. Krause & Managan Lbr. Co.*, 125 La. 710 (51 Sou. 696).

Art. 2446. See Art. 2428, 122 La. 170; Arts. 1757 and 1536, 110 La. 653; Art. 1900, 112 La. 269; Art. 2425, 118 La. 364.

In such a case a deed from the wife to a third person, and from such third person to the husband, executed on the same day, before the same witnesses, in the same handwriting, and put on record on the same day, must be viewed as one transaction, the object of which was to divest the title of the wife and vest it in her husband. *Douglass vs. Douglass et al.*, 51 La. An. 1456 (26 Sou. 546).

A sale of such property between husband and wife can be made only in the cases and for the consideration as provided in Art. 2446; and, if apparently made for some other consideration, is invalid on its face; and, if attacked by a party showing sufficient interest, the burden of proof rests upon the parties seeking to maintain the validity of such sale to show that the real consideration was within the exceptions provided in said article. *Rush et al. vs. Landers*, 107 La. 550 (32 Sou. 95).

Art. 2447.

It is immaterial whether the defendant knew of the suit or not, as the Code strikes with nullity such a purchase without limiting the nullity to the cases where the purchaser knew that the property was in litigation. The law charges everybody with knowledge of what is being done in the courts, especially the lawyers practicing therein. *Wells vs. Goss*, 110 L. 355 (34 Sou. 470).

A right is said to be litigious whenever there exists a suit and contestation on the same. This is the controlling definition of the law of this State upon the subject, and it is applicable as well to the public officers mentioned in Art. 2447 as to other persons. *Saunders vs. Ditch*, 110 La. 884 (34 Sou. 860).

An attorney cannot acquire a vested interest in a pending suit, and decided against the attorney. Counsel concede that a right to damages for personal injury is not assignable, but controvert the proposition of the District Court that "the attorney had no lien." *Smith vs. V., S. & P. Ry. Co.*, 112 La. 988 (36 Sou. 790).

Where the judgment rendered in such a suit was several months thereafter transferred to an attorney at law,

and the defendant subsequently took a devolutive appeal: *Held*, that he had no interest in contesting, on such appeal, the title of the attorney, because, if his purchase was null, as contended, the title to the judgment remained in the plaintiff, who was before the Court as appellee, and because, further, the purchase *per se* did not affect the defendant. Where an attorney purchases a litigious right in the form of a judgment, the remedy of the defendant is to oppose its execution when the attorney attempts to enforce it. *Kuck vs. Johnson*, 114 La. 781 (38 Sou. 559).

A title ceases to be litigious when final judgment is rendered in the cause, and its litigious character is not revived by subsequent litigation between the successful claimant and other parties asserting title from the same author. This nullity is relative, and can be invoked only by the party to the suit against whom the right is to be exercised. *Saint vs. Matrel*, 122 La. 93 (47 Sou. 413).

As relates to the litigious rights as cause for defeating plaintiff's claim, we have not found that this plea is sustained by the facts. The claims transferred were not in suit. The possibility of a suit to recover an amount does not bring the right within the prohibition of Art. 2447. *Means, Receiver, vs. Ross, Keen & Co.*, 106 La. 178 (30 Sou. 300).

Refer to Arts. 2652, 2653.

Art. 2448.

The assignment of the unearned part of his salary by a public officer is against public policy and void. *McGowan vs. Cty of N. O.*, 118 La. 429 (43 Sou. 40).

Under Art. 2448, a contract to explore mineral land was assignable, though it made no mention of assigning or of the right to assign. *Anse la Butte Oil & Mineral Co. vs. Babb*, 122 La. 416 (47 Sou. 754).

Refer to Art. 2449.

Art. 2449. See Wright-Blodgett Co., Ltd., vs. Elms, 106 La. 158; Art. 2448, 118 La. 431.

Individuals may make agreements or dispositions as to taxation, and as to payment of taxes, which may be binding between themselves; but such agreements cannot have effect against the State when ~~thereby~~ the parties themselves, or the objects of taxation, ~~are not brought~~ within the grasp of the laws governing ~~tax~~^{taxes} and their enforcement.

Assessors and Tax Collectors cannot go outside of the existing statutes. *Williams vs. Sheriff & Tax Collector*, 107 La. 93 (31 Sou. 926).

Art. 2450. See Art. 1776, 108 La. 658; Art. 453, 115 La. 307.

He positively declined to deliver the property or to consider himself bound by the stipulation touching the option. Delivery of a thing is an obligation which a vendor cannot deny when his vendee has complied with all that can be expected of him. (Arts. 2450, 2567.) *Murphy vs. Hussey*, 117 La. 394 (41 Sou. 692).

Refer to Art. 2567.

Art. 2451. See Art. 1776, 108 La. 658.

If one has a lease on land to bore for oil, he cannot extend the lease beyond its terms on the ground that he has failed to find oil; for by his contract he acquires merely a hope, and the lessor has discharged his obligation by permitting the lessee to attempt to realize his hope. *Cooke vs. Gulf Refining Co. of La.*, 127 La. 593 (53 Sou. 874).

Refer to Art. 3452.

Art. 2452. See *Bennett vs. Calmes*, 116 La. 599; Art. 1819, 122 La. 983.

Where a person, who, dying without descendants, has left a mother, has disposed of more than two-thirds of the property by donations *mortis causa*, the donations being of particular property in its entirety to a brother, and the residue to his wife, the effect of a judgment recognizing the mother as a forced heir for one-third is not to vacate, *ipso facto*, the title of the particular legatee to the extent of the one undivided third as a conveyance by the testator to that extent of the property of another, and, therefore, null and void. *Succession of Jacobs*, 104 La. 447 (29 Sou. 241).

The purchasers from the original vendee were not in bad faith in buying the property from this vendee, who had no title. The sale of the property of another is not entirely void when the purchaser is not in bad faith; and it is, therefore, subject to prescription less than thirty years. (See Art. 1887.) *Cox vs. Von Ahlefeldt*, 105 La. 543 (30 Sou. 175).

Where machinery has been sold to a planter, which he has immobilized by attaching it to his plantation, and the property to which the same was attached was permitted to be seized and sold without opposition of any kind in enforcement of a pre-existing mortgage, the seller cannot, after the sale, as against the purchaser, recover the machinery under a claim of ownership. *Machine Company vs. Newman*, 107 La. 702 (32 Sou. 38).

A widow in community holding either no title at all to her husband's half of a piece of community property, or at best a testamentary usufruct in the same, sold the property in its entirety to a third person, who at once took possession of it. The fact that there stood registered at the date of the sale a conveyance of the property by her husband's heir to a third person did not, *per se*, prevent the running of prescription. *Jordan vs. Richards*, 114 La. 329 (38 Sou. 206).

Article 2452 must be construed with Arts. 2485, 2484, 2483, 2478 and 1749. *Leverett vs. Loeb*, 117 La. 312 (41 Sou. 584).

In such case the purchaser incurs no obligation to pay the price, and may sue to annul the sale and recover the price paid at any time, though he may not have been actually evicted or disturbed in his possession by the true owner. Case of *Bonnabel vs. Municipality*, 3 La. An. 699, overruled. *Bonvillain vs. Bodenheimer*, 117 La. 794 (42 Sou. 273).

That the defendant sold property which he did not own is no defense in an action for damages brought by the purchaser in good faith under the provisions of Art. 2452. *Legier vs. Braughn*, 123 La. 465 (49 Sou. 22).

Refer to Arts. 2471, 2500, 2506, 3513.

Art. 2453. See Art. 2286, 118 La. 987; Howcott vs. Petit, 106 La. 531; Lawson vs. Connolly, 51 La. An. 1762.

Where, pending an injunction against the sale of property which is under seizure by the Sheriff, it is sold in enforcement of taxes, and the adjudicatee has been placed in possession under a recorded title, and the time for redemption has expired, the Sheriff cannot be forced, upon the dissolution of the injunction, to proceed with the sale of the property under the seizure. The principle lying behind

Arts. 2149 and 2453 does not apply to such a case. *Flower, King & Putman vs. Beasley*, 52 La. An. 2054 (28 Sou. 322).

Where a person, alleging that another who made a sale to him of real estate illegally refused to execute a deed of sale, institutes a suit in which he claims ownership of the property, and prays that defendant be ordered to execute a deed of sale, and he incidentally causes an injunction to issue, enjoining defendant from disposing of the property, he cannot, when the injunction has been dissolved as not having been justified by the facts, shelter himself from damages for a wrongful injunction on the ground that his action claiming the property would, under Art. 2453, have had the same effect as an injunction. *Elms vs. Wright-Blodgett Co., Ltd., et al.*, 106 La. 19 (30 Sou. 315).

Article 2453 contemplates the carrying on of the suit to judgment. If the plaintiff, after having made his demand, abandons it, it is after abandonment as if the suit had not been brought. There need be no formal entry of abandonment for discontinuance. *Wells vs. Goss*, 110 La. 348 (34 Sou. 470).

Act 22, p. 25, of 1904, has brought no change in our law, except that, whereas formerly, third persons dealing with property involved in litigation had to take notice of the pendency of the litigation without registry, now, under said act, they are not required to do so unless the notice prescribed by the act has been duly recorded. *Wells vs. Blackman*, 117 La. 360 (41 Sou. 649).

Art. 2456. See *Davenport, Tutrix, vs. Adler & Co.*, 52 La. An. 270; **Art. 2439**, 104 La. 133; *Tuteal vs. McKnight*, 110 La. 258; **Art. 1901**, 114 La. 619; **Art. 2021**, 121 La. 153.

Under the Cotton Exchange rules, a contract for the sale of cotton is deemed final when the price has been agreed upon between the seller and buyer; and the delivery of same is considered to have been completed when it passes the scales. The buyer is bound to receive the cotton purchased within seven working days from the day of sale; but, after demand has been made upon the press for delivery without avail, same remains at the risk of the seller, who is liable for the loss or deterioration sustained thereto by any fault of his or by the happening of a fortuitous event. This modi-

fies the law, but must be adhered to by the parties. *Patton & Co. vs. Newman*, 51 La. An. 1428 (26 Sou. 576).

If the vendor in possession should, by a second contract, transfer the ownership of the property to another person, who gets possession before the first obligee, the transferee is considered as the owner, provided the contract be made on his part *bona fide* and without notice of the former contract. In like manner, if movable property has been alienated by a contract, but not delivered, it is liable in the hands of the obligor to seizure and attachment in the hands of his creditors. *Williams vs. Sheriff & Tax Collector*, 107 La. 103 (31 Sou. 926).

Refer to Arts. 2468, 2469, 2470, 2486.

Art. 2457. See *Machine Co. vs. Newman*, 107 La. 709; **Art. 1901, 114 La. 619.**

Art. 2458. See **Art. 871, 52 La. An. 264; Art. 1915, 110 La. 552;** *Kent vs. Jacobs Lbr. Co.*, 122 La. 1063.

Article 2458 is applicable to a sale of standing timber, the title to which does not pass until it has been cut. *Lee Lbr. Co. vs. Hotard*, 122 La. 851.

Art. 2459. See **Art. 2439, 107 La. 98; Art. 1920, 123 La. 961.**

Art. 2461.

The bonds were advertised to be sold with coupons attached. The coupons were attached to the bonds at the time that plaintiff's bid was accepted. It was only after the bid was accepted that they were detached. The bonds and coupons bore the date of the statute under which they were issued. Their maturity is fixed for that date. The statute provided a plan for issuing bonds and coupons, and at the same time for their payment; nothing more. The date of the issue of the bonds and coupons is not necessarily the date that it was found convenient or advantageous to sell them. *State National Bank vs. Board of Commissioners*, 121 La. 269 (46 Sou. 307).

Art. 2462. See *Wright & Blodgett Co. vs. Elms*, 106 La. 157; **Art. 2275**, 116 La. 140; **Arts. 2439 and 1926**, 117 La. 283; **Arts. 2439 and 1931**, 119 La. 36; **Art. 2021**, 121 La. 167; **Art. 2275**, 121 La. 595.

This article was amended by **Act 249 of 1910**, p. 417, to read as follows: A promise to sell, when there exists a reciprocal consent of both parties, as to the thing, the price and terms, and which, if it relates to immovables is in writing, so far amounts to a sale as to give either party the right to enforce specific performance of same. One may purchase the right or option to accept or reject within a stipulated time an offer or promise to sell. After the purchase of such option for value, such offer or promise cannot be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract, or agreement to sell, evidenced by such promise and acceptance, may be specially enforced by either party.

There is, besides, a promise to sell made by the head of the community before its dissolution, which these administrators could not totally disregarded in the manner proposed. Such a promise gives rise to an enforceable right between the parties. *Magruder vs. Hornot*, 110 La. 587 (34 Sou. 696).

An agreement whereby one of the parties obligates himself to make to the other a bond for title can be considered a promise to sell within Art. 2462 only by holding that an agreement to do that which amounts to a sale amounts to a promise to sell. The law in question is, however, exceptional, and its application must be confined to the cases provided for, and cannot properly be extended to what may be considered the equivalents of those cases. *Kaplan vs. Whitworth*, 116 La. 337 (40 Sou. 723).

The acts of the parties have brought the promise to the state of an actual sale. The buyer being in possession, and having paid, in addition to the earnest money, an amount on the remainder of the price, it only remains for him to prove his willingness and ability to pay the remainder of the price. After legal and sufficient proof made, and deposit of the remainder if necessary, then it will be incum-

bent upon the seller to sign the deed. *Stafford vs. Richard*, 121 La. 76 (46 Sou. 107).

True, our Code says that a promise of sale amounts to a sale; but by the settled jurisprudence this means no more than that the contract is susceptible of specific enforcement. It does not mean that the buyer becomes owner of the property or debtor for the price. *Barber Asphalt Paving Co. vs. St. Louis Cypress Co.*, 121 La. 167 (46 Sou. 193).

A written promise of sale was signed to the defendant, promisee. It contained all the elements of a sale, save to the defendant was given time within which to comply with the terms and conditions of the agreement, and then the deed was to be signed. Plaintiff accepted amounts paid on the price. The promisee acquired a right to the property, subject to the condition expressed, which he could not sell. *Sheridan vs. Reese*, 122 La. 1027 (48 Sou. 443).

The words "for and in consideration of the sum of \$2,500, \$10 of which is paid in cash by S. J. K., the balance to be paid on the 2nd day of January, 1909," evidences an intention on the part of the parties to consider the sum paid, not as earnest money, but as part of the purchase price. *Nosacka vs. McKenzie*, 127 La. 1063 (54 Sou. 351).

Refer to Arts. 2439, 2463.

Art. 2463. See Art. 2462, 110 La. 587; Art. 1801 (Arts. 2439 and 2440), 114 La. 245; Art. 1931, 119 La. 36.

It would require a rigid construction to give to a promise of sale the force and effect of a sale. There is a limit to this provision of our Code, Art. 2463. The limit is made evident by the following article. *Capo vs. Bugdahl*, 117 La. 995 (42 Sou. 478).

Earnest, in the civil law, is the sum of money which one of the contracting parties delivers to the other at the time of the contract, and is presumed to be a forfeit in the absence of evidence that the parties then and there intended to bind themselves by an irrevocable contract. *Legier vs. Braughn*, 123 La. 463 (49 Sou. 22).

Where it was stipulated in a promise of sale that "the \$1,000 deposited by the proposed purchasers was earnest money, and, should the sale fall through any fault of the vendor, the \$1,000 shall be returned to the purchaser with an additional \$1,000," and the proposed sale falls because of

the vendor failing to tender a valid title, the stipulation recited must be enforced by the Court. *Lyons vs. Woman's League of N. O.*, 124 La. 222 (50 Sou. 18).

Art. 2464. See Art. 2034, 117 La. 1030; Art. 1860, 119 La. 826.

The amount of \$5 mentioned in the deed as a consideration is not sufficiently large for it to be considered as a serious price. *Spainer vs. De Voe et al.*, 52 La. An. 582 (27 Sou. 174).

A transfer in writing of real estate attacked must be held null, either as a sale or a *dation*, if it be not shown that it was made for a price that was agreed on. *Pulford, Tutor, vs. Dimmick et al.*, 107 La. 403 (31 Sou. 879).

Refer to Arts. 2655, 2659.

Art. 2465. See Art. 1779, 111 La. 820.

If the price is left to be determined by experts to be named thereafter by the parties, the contract is null, since either of the parties can nullify it by refusing to appoint the expert. *Louis Werner Saw Mill Co. vs. O'Shee*, 111 La. 817 (35 Sou. 919).

Art. 2466. See *Kaplan vs. Whitworth*, 116 La. 347.

Art. 2467. See *Kent vs. Davis Bros. Lbr. Co.*, 122 La. 1056.

Art. 2468. See Art. 2456, 51 La. An. 1451; *Kessler & Co. vs. Monheim*, 114 La. 620.

Art. 2469. See Art. 2456, 51 La. An. 1451.

Art. 2470. See Art. 2456, 51 La. An. 1451.

Art. 2471. See Arts. 2447 and 2452, 107 La. 709.

Art. 2474. See Art. 1760, 105 La. 25; Art. 1776, 108 La. 662; Art. 1764, 111 La. 273.

Plaintiff contracted to sell several tracts of land to defendants, and after consummation of the sale, except as to tracts title to which plaintiff did not have, they made a new contract, reciting postponement of the sale as to them till plaintiff should perfect the title, and that defendant bound himself to accept title to them at the same price per acre

within a certain time, "as titles are perfected to any part of said lands." *Held*, that, though, when the second agreement was made, the parties knew that the land of one tract had been separated in title from the timber thereon, the sale was of the land with its timber, any doubt being resolved against the plaintiff under Art. 2474 of the Civil Code. *Mowe vs. Richardson*, 124 La. 130 (49 Sou. 1003).

Art. 2475.

He who sells a credit or an incorporeal right warrants its existence at the time of the transfer, though no warranty be mentioned. The act of B in accepting interest at the date of the maturity of the instrument he held, and extending the note for a year, did not prejudice his right to recover judgment against Gallagher on his warranty. *Cluseau vs. Wagner*, 126 La. 376 (52 Sou. 547).

Whilst it is true that in matters relating to warranty they must be carried before the Court having cognizance of the principal action in which the demands in warranty arise, it is also true that a demand in warranty in legal contemplation arises in an action only when made by the party who has been sued. Hence, the plaintiff in a petitory action has no right to call his vendor in warranty; the Court in which such action is brought has no authority to compel the warrantor, who does not reside within its jurisdiction, to litigate in response to such call; and prohibition will issue to stay the attempted exercise of such authority. *Foote vs. Pharr*, 115 La. 35 (38 Sou. 885).

Refer to Arts. 2501, 2505, 2519, 2646.

Art. 2476. See Art. 871, 52 La. An. 270.

This article must be read in conjunction with Art. 2502. The vendor is not precluded by his warranty from seeking to reacquire by prescription the property he has sold. *Succession of Zebriska*, 119 La. 1076 (44 Sou. 893).

Where the purchaser of a steam tug sued in reconvention for a reduction of the price to the extent of \$1,000 on account of concealed defects in the hull and machinery of the boat: *Held*, that, having elected to keep the vessel, he cannot recover for repairs made thereon or for damages, but is restricted to his claim for a reduction of the price. The responsibility of the *bona fide* vendor is measured by the difference in value between a sound and unsound article.

Iberia Cypress Co. vs. Von Schoeler, 121 La. 75 (46 Sou. 105).

Refer to Arts. 2502, 2541.

Art. 2477. See Art. 871, 52 La. An. 270; Art. 1539, 119 La. 155.

Art. 2478. See Succession of Sinnott vs. Bank et al., 105 La. 714; **Art. 2439**, 107 La. 98.

The sale of all the cypress timber fit for sawmill purposes on a certain tract of land for a cash price, with the exclusive right and privilege to cut and remove the same for a period of five years, is a conveyance of only so many trees as the purchaser may cut and remove within the time designated, the balance remaining the property of the vendor. *St. Louis Cypress Co. vs. Thibodeaux*, 120 La. 835 (45 Sou. 742).

Art. 2479.

Hence, if the strip in dispute was in the possession of the Panola Company at the date of the sale, it was, by operation of law, delivered to the purchaser. If it was then in possession of the defendant C, warranty was excluded by the terms of the deed, as it must be presumed that he claimed the land which he actually possessed. *Clapham vs. Clayton*, 118 La. 422 (43 Sou. 36).

Where, by the terms of the sale by authentic act of immoveable property, no part of the price is payable in cash, and the vendee, who is in possession at the time of the sale, so continues, the sale and delivery of possession are none the less complete because such vendee fails to make the deferred payments as called for by the contract; nor does the title revert to the vendor as a consequence of such failure. *Wells vs. Blackman*, 121 La. 394 (46 Sou. 437).

Art. 2481. See Succession of Sinnott vs. Bank et al., 105 La. 714.

Art. 2485. See Art. 825, 118 La. 422.

Art. 2486. See Art. 2456, 51 La. An. 1451; Art. 1926, 124 La. 870.

Art. 2489. See Art. 460, 51 La. An. 783.

Art. 2490. See Art. 662, 51 La. An. 220; Art. 460, 51 La. An. 783.

In fixing the value, we have borne in mind that the value of the property must be considered as of the year 1904, the date of the sale; that is, the value at the time of the sale. (Arts. 1871, 2490.) And it includes the trees and accessories on the property at that time. *Hyde vs. Barron*, 125 La. 230 (51 Sou. 126).

Refer to Arts. 1903, 1930.

Art. 2491. See Art. 2494, 110 La. 1000.**Art. 2492.**

No matter how great the excess of acreage may be over that specified in the act of sale, it gives rise only to an action for a supplement of the price, and not to an action for rescission on the ground of error. *Citizens' Bank of La. vs. Lenoir*, 118 La. 720 (43 Sou. 385).

Refer to Arts. 2493, 2494, 2496.

Art. 2493. See Art. 2494, 110 La. 1000; Art. 2492, 118 La. 723.**Art. 2494. See Art. 1896, 105 La. 26; Art. 2492, 118 La. 723.**

A sale by government subdivisions controls acreage stipulated in the deed. Such sales of land have certain limits which are mathematically established and generally known. From this it becomes a certain and limited body. In a sale of this character a supplement of the price in the event of an overplus of measure cannot be claimed by the seller, neither can the purchaser claim a diminution of the price on account of deficiency in the measure unless the real measure falls short by one-twentieth, regard being had to the totality of the object sold. *Williams vs. Bernstein*, 51 La. An. 123 (25 Sou. 411).

A contract of lease in which a plantation is designated by name, and the number of acre in cultivation is stated approximately, is not a lease *per averisionem*, but falls within the rule established by Arts. 2701 and 2494; and, where "the real measure comes short of that expressed in the contract by one-twentieth," the lessee is entitled to a corre-

sponding abatement in the rent. *McVea vs. Vance & Logan*, 110 La. 998 (35 Sou. 262).

Where land is not sold or conveyed at the rate of so much per measure, but from boundary to boundary, and from the language used it appears to have been the intention to convey all the land within the boundaries given, the conveyance is *per aversionem*, and the grantee is entitled to recover all such land from a third person whose asserted title, originally bad, has not been made good by prescription. *Messi vs. Frechede*, 113 La. 679 (37 Sou. 599).

The right of action by a purchaser for a lump sum of a certain and limited body of land actually containing 3.85 acres, but said to contain 10 acres, more or less, is for a diminution of price under Art. 2494, and not for a supplement of the area. *Gladstone Realty Co. vs. Currie*, 126 La. 115 (52 Sou. 237).

Refer to Arts. 2491, 2493, 2495, 2701.

Art. 2495. See Art. 2494, 110 La. 1001, and 113 La. 689; Art. 854, 128 La. 37.

Art. 2496. See Art. 2531, 114 La. 502; Art. 2492, 118 La. 723.

Art. 2497. See Art. 2301, 108 La. 656.

Art. 2500. See Arts. 2452 and 2514, 117 La. 799.

Art. 2501. See Art. 2428, 122 La. 172; Art. 2475, 126 La. 381.

If A sells property of which he is the owner, and, it being sold in satisfaction of a debt due by him, he becomes the purchaser, either directly or through mesne conveyance, the title so acquired inures to the benefit of such vendee. The seller is bound to deliver and warrant the thing which he sells. *Wells vs. Blackman*, 121 La. 415 (46 Sou. 437).

Art. 2502. See Art. 2476, 119 La. 1079.

Art. 2504.

Appellant urges that the contract between himself and the city was a valid contract under the city charter, and that the validity was not affected by the neglect of the city officials to give the property-owners a notice as directed by

a city ordinance, and which failure had enabled them to escape from contributing towards the cost of the work; that the city, in transferring the paving certificates to him with subrogation to its rights, warranted the existence of the claims transferred, and it could not claim exemption from warranty, as the non-existence of the claims against the property was the result of its own fault. *Held*, that, under the circumstances, the city's defense is not just nor well founded. *Brunning vs. City of N. O.*, 122 La. 317 (47 Sou. 624).

Refer to Art. 2646.

Art. 2505. See Art. 2475, 126 La. 381.

An act of sale containing a clause excluding recourse as well as warranty is held to mean that, should the buyer be subsequently evicted, he has no claim upon the seller for restitution of the price. *Lyons vs. Fitzpatrick*, 52 La. An. 697 (27 Sou. 110).

The State assessed property belonging to two different persons as if it belonged to only one, and sold it. The one who owed no taxes sues to set aside the sale. We are of opinion that the defendants are entitled to recover the amounts paid for the property by Charles J. Cole at the tax sale, and by him and them as taxes thereafter; and are also entitled to recover the amounts paid to their vendors. *George vs. Cole*, 109 La. 834 (33 Sou. 784).

Art. 2506. See Arts. 2452 and 2514, 117 La. 778; Tulane Educational Fund Administrators vs. Baccich & De Montluzin, 129 La. 475.

But the only effect of his claiming above and beyond what the law allows should be the reduction of his demand to what the law permits him to claim, not the dismissal of his entire demand. *Pharr vs. Gall et al.*, 104 La. 700 (29 Sou. 306).

Where a vendee buys real estate by a description which does not correspond with that by which he sells, and, being sued in eviction, calls his vendor in warranty, without alleging error of description in the title by which he acquired, he ought not to be permitted to prove such error by oral testimony; and, should such description fail to identify the property from which he is sought to be evicted with that sold to him, he cannot recover on the demand in warranty,

but must be relegated to some other action for the assertion of his claim against such vendor. *Pecot vs. Prevost*, 117 La. 765 (42 Sou. 263).

Art. 2510.

Plaintiff's agent applied to defendants for an option to purchase a large tract of land. Defendants, without notifying plaintiff's agent that they had no written authority to sell a part of the tract, issued the option including such part, and plaintiffs were thereafter compelled to pay the owner an increased price in order to carry out the scheme for which the tract was desired. *Held*, that, defendants having notice that plaintiffs desired to secure the entire tract, the difference between the option price and what plaintiffs were compelled to pay the owner for such part of the land could properly be held to have reasonably entered into contemplation of the parties as the damages plaintiffs would sustain from defendants' inability to convey such part, though they did not know the purpose for which the land was desired or the identity of the purchasers. *Tulane Educational Fund. Adm. vs. Baccich & De Montluzin*, 129 La. 470 (56 Sou. 371).

Art. 2511.

Whether, when the purchaser is in danger of being evicted from one-fifth of the property, the bond to be given by the seller should be for one-fifth or for the whole of the price? But when the purchaser has sold half of the property, and is gradually disposing of the remainder, he must be held to have elected not to ask for a rescission of the sale; and in such case a bond is to be given for that part of the property as to which there is danger of eviction. *Jennings-Heywood Oil Syndicate vs. Home Oil & Development Co.*, 113 La. 384 (37 Sou. 1).

Art. 2514.

In cases of partial eviction, the relative value at the time of the sale of the part from which the purchaser has been evicted as shown by evidence should be considered. Equality of value can be presumed only in cases where there is no proof of relative value. *Bonvillain vs. Bodenheimer*, 117 La. 794 (42 Sou. 273).

Refer to Arts. 2500, 2506.

Art. 2517. See *Rion vs. Reeves*, 122 La. 659.

Art. 2518. See *Rion vs. Reeves*, 122 La. 659; *Scovell vs. Levy's Heirs*, 118 La. 991.

Art. 2519. See **Art. 2531**, 114 La. 502; **Art. 2475**, 115 La. 39.

Art. 2520. See **Art. 2531**, 114 La. 502.

Art. 2531.

While a vendee who has sold the things which he purchased has disabled himself from bringing a redhibitory action, he may still have relief in an action *quanti minoris*; and in such an action he can claim and recover damages from his vendor if he knew of the vices of the things he sold, but omitted to declare them. He is, however, controlled as to such demand by the conditions, rules and limitations of the action *quanti minoris*. *George vs. Shreveport Cotton Oil Co.*, 114 La. 498 (38 Sou. 432).

Refer to Arts. 2438, 2496, 2519, 2520, 2534, 2541, 2543, 2544, 2545.

Art. 2534. See **Art. 2531**, 114 La. 503.

The prescription of one year has no basis to rest on as against an action for redhibition where the seller has knowledge of the vice of the thing he sells and omits to declare it, and where the action is brought within a year from the discovery of such vice by the buyer. The buyer may limit his demand to a reduction of the price, though, where the seller knows of the vice of the things sold, and omits to declare it, he may be held for damages. *Christie & Lowe vs. Pa. Iron Wks. Co.*, 128 La. 209 (54 Sou. 742).

Where machinery was received and used by the buyer for more than a year before offering to return it to the seller, during which time the buyer paid several installments of the purchase price without serious complaint as to the defects of the machinery: *Held*, that the conduct of the buyer was equivalent to an acceptance of the machinery, but that such acceptance did not conclude the buyer from demanding a reduction of the price for non-apparent defects known to, but not disclosed by, the seller. *Templeman Bros. Lbr. Co. vs. Fairbanks, Morse & Co.*, 129 La. 983 (57 Sou. 309).

Refer to Arts. 2541, 2542, 2543, 2544, 2545, 2546.

Art. 2538. See Bonvillian vs. Bodenheimer, 117 La. 807.

Art. 2541. See Art. 2531, 114 La. 502; Art. 2476, 121 La. 75; Art. 2534, 128 La. 239; Art. 2534, 129 La. 1004.

Art. 2542. See Art. 2534, 129 La. 1004.

Art. 2543. See Art. 2531, 114 La. 502; Art. 2534, 129 La. 1004.

Art. 2544. See Art. 2531, 114 La. 502; Art. 2534, 129 La. 1004.

Art. 2545. See Art. 2531, 114 La. 498; Art. 2534, 128 La. 239.

Art. 2546. See Art. 2534, 128 La. 239.

Art. 2550.

A contract of lease for five years of a lot and building thereon for a certain price, payable in monthly installments, is sufficient consideration for a stipulation inserted therein giving the lessee the right to purchase the property for a fixed price at any time during the continuance of the lease. Such a stipulation is not a *nudum pactum*, and the lessor cannot withdraw the option before the termination of the lease. A stipulation for a fixed price means cash, and not terms of credit. *Succession of Witting*, 121 La. 502 (46 Sou. 606).

Art. 2553.

The right to suspend payment of the price does not necessarily imply a forfeiture of any part of the debt or its accessories. The purchaser must either deposit the amount of his purchase or pay interest thereon. The dictum of *Duruty's case*, 42 La. An. 362, and of *Tobin's case*, 115 La. 366, applies only to the cash portion of the price, and to cases where judicial action is required to remove presumptive defects in the title tendered. *Tobin vs. O'Kelley*, 117 La. 753 (42 Sou. 258).

Art. 2554. See *George vs. Shreveport Cotton Oil Co.*, 114 La. 503.

In an action on a note not bearing interest, representing the purchase price of the property, interest begins to run from the maturity of the note. Imputation of payment remains as made between the debtor and creditor in the absence of any plea by a third person objecting to the imputation as made. *Hughes vs. Mattes and Old Bangor Slate Co.*, 104 La. 231 (28 Sou. 1009).

Art. 2556.

Where the purchaser is threatened with eviction, he may suspend the payment of the price until the seller has restored him to possession or caused the disturbance to cease, unless the seller prefer to give security; and he may also require the deposit of the price to relieve himself from the payment of the interest. *Tobin vs. O'Kelley*, 117 La. 755 (42 Sou. 258).

Refer to Arts. 2558, 2559.

Art. 2557. See *Holiday vs. Hammond State Bank*, 116 La. 903.

Danger of eviction justifies the suspension of payment of the price only until the seller has furnished bond. In all cases where the price is due and payment is refused, the seller is entitled to judgment, subject to stay of execution until the danger of eviction has ceased or bond has been furnished. *Jennings-Heywood Syndicate vs. Home Oil & Development Co.*, 113 La. 384 (37 Sou. 1).

These articles provide only for the case of a buyer who has not yet paid; and (when considered in connection with the provisions of the Code of Practice) suggest the idea that the disturbance referred to in Art. 2557 means the institution of a suit against him. The provision which follows, and which concerns the buyer who has paid, is more specific—viz., Art. 2560. *Bonvillain vs. Bodenheimer*, 117 La. 800 (42 Sou. 273).

Refer to Arts. 2558, 2559, 2560.

Art. 2558. See **Art. 2556**, 117 La. 755; **Art. 2557**, 117 La. 799.

Where the purchaser of real estate has signed the completed act of purchase, but does not take possession, and, in-

stead of paying the price, by agreement with the seller, deposits it in the bank, subject to the condition that it shall not be paid until title to the property is found good; and where there is a defect in the title, of which the purchaser was informed when the act was signed by him, and which it was the purpose of the agreement and the deposit to give the seller an opportunity to cure: *Held*, that the money cannot be withdrawn by the purchaser without the consent of the seller until such reasonable opportunity shall have been exhausted. *Holliday vs. Hammond State Bank*, 116 La. 891 (41 Sou. 198).

Art. 2559. See Art. 2556, 117 La. 755; Art. 2557, 117 La. 809.

Art. 2560. See Art. 2557, 117 La. 800.

Art. 2561.

Where a sale of real estate purports to have been made for cash, but the evidence shows that no money was paid, and fails to show any other adequate consideration: *Held*, that such a sale should be dissolved for non-payment of the price in default of the purchaser paying the same with interest within a delay to be fixed by the Court. *Harvin vs. Blackman*, 121 La. 432 (46 Sou. 525).

Refer to Art. 2562.

Art. 2562. See Art. 2561, 111 La. 438.

Art. 2566. See Art. 2236, 125 La. 930.

When the counter-letter shows that the purchaser was to become the absolute owner under failure of the vendor to redeem, and where the purchaser went into possession of the property and exercised rights of ownership over it, mere inadequacy of price is not sufficient to justify the Court in holding that the contract was not a sale, but an hypothecation. The remedy where the price paid is less than one-half of the value of the immovable sold is by action of lesion. *Bonnette vs. Wise*, 111 La. 856 (35 Sou. 953).

Refer to Arts. 2570, 2594.

Art. 2567. See Art. 2450, 117 La. 394.

Where an act purporting to be a sale of real estate, and a counter-letter confirmatory of said act according the

vendor the right to redeem the property within a certain time, are annexed to, and made part of, a petition, in which it is alleged that the transaction was intended merely to secure a loan, and it is not alleged that the money necessary to redeem the property was paid or tendered within the time allowed, or that the property was worth less at the date of the transaction than the amount received by the vendor, or that the vendor remained in possession, an exception of no cause of action is properly sustained to a demand that the vendor be decreed the owner of the property and restored to possession on payment of the amount received by him with interest. *Bagley vs. Bourque*, 107 La. 395 (31 Sou. 860).

Art. 2570. See Art. 2566, 111 La. 859.

Art. 2588. See Art. 2236, 125 La. 930.

Art. 2589. See Art. 1870, 107 La. 112; Art. 1860, 109 La. 955, 109 La. 987, 112 La. 45; Art. 1861, 120 La. 1070; Art. 465, 123 La. 962.

The Judge's estimate of the value of the property under his appreciation of the evidence was too high. The burden was on the vendor to prove lesion beyond moiety by evidence peculiarly strong and convincing, and of such a nature as to exclude speculation and conjecture. *Hickman vs. Washington*, 122 La. 945 (48 Sou. 333).

Refer to Art. 2590.

Art. 2590. See Art. 1870, 107 La. 112; Art. 1860, 109 La. 955; Art. 1861, 120 La. 1070; Art. 2589, 122 La. 949.

In matter of determining lesion, the value of the property at the date the option was accepted (and not the date of the offer to sell) is to be ascertained; and, as to value, its different elements should be proven with reasonable certainty. *Ronaldson & Puckett Co. vs. Bynum*, 122 La. 688 (48 Sou. 152).

Art. 2591. See Art. 1860, 109 La. 987, and 112 La. 45; Art. 1870, 107 La. 112.

Art. 2592. See Art. 1860, 109 La. 988.

Art. 2594. See Art. 2566, 111 La. 859; Art. 465, 123 La. 962.

It may be noted that sales of immovables with the pact of redemption are not included in the exceptions set forth in Art. 2594. *Bonnette vs. Wise*, 111 La. 859.

Art. 2598. See Art. 1860, 112 La. 45.

Art. 2599. See Art 1860, 112 La. 45.

Art. 2606.

The one bidding should have reason to know at the time that his bid will be good should he be the highest bidder. There can be no ratification. The adjudication was null and void for absolute want of evidence. It must be a complete act of adjudication, and cannot be made good some time afterward by an offer to supply that which should have been given in the first place. *Reinach vs. Jung*, 122 La. 611 (48 Sou. 124).

Art. 2608.

A judicial sale is completed by the adjudication; and, if the property is sufficiently described in the advertisement, and the adjudication is made in accordance therewith, the sale is good, though the description, as subsequently recited in the *proces verbal*, be insufficient. *Smith vs. Krause & Managan Lbr. Co.*, 125 La. 704 (51 Sou. 693).

Art. 2610.

Where real estate is adjudicated for cash at a judicial sale, the purchaser cannot retain the price until the act of sale is passed, as provided in case of a voluntary sale as in case of a public auction, but must comply with his bid on the demand of the officer making the sale. Act No. 316 of 1908 has no application where the Court orders or the seizing creditor instructs the Sheriff to sell for cash, payable at the time of the adjudication. *Beck vs. Progressive Realty Co.*, 130 La. — (57 Sou. 578).

Art. 2621.

Any feature in the proceedings for a judicial sale which will cause injury by deterring competition and bringing about insoluble complications is ground for injunction; and, hence, where a vendor instituting executory process on a pur-

chase note remaining unpaid seized and advertised for sale the land sold the vendee, together with a tract sold to another, the vendee could have the sale enjoined; since, as the sale would have been void, as to both tracts taken separately, because of the want of fixed separate prices, and, as to the tract not belonging to the vendee, as a sale of property of the third person, competition would have been prevented, as no one would care to bid at such a sale. The vendee could not have cured the nullity by filing a waiver of irregularity, as he could not have waived the irregularity as to lands not belonging to him, and the sale would have still been void as to the whole, since a judicial sale of property *in globo* cannot be valid for part and null for part. *Mullins vs. Hanne-man*, 123 La. 643 (49 Sou. 271).

Art. 2623.

The adjudicatee at a judicial sale made pending an expropriation suit has a standing to intervene in the suit; and the question of whether or not he is in default in complying with his bid cannot be decided as an incident to the expropriation suit. *Y. & M. V. Ry. vs. Clarke*, 120 La. 1044 (46 Sou. 17).

Art. 2625. See *Thompson vs. Vance*, 110 La. 37.

Art. 2626.

When the work ordered by the Board of Levee Commissioners to be made is authorized in the exercise of police power, the contractor for the work can enter the owner's property to execute the same, and he cannot resist him. When such resistance is made, he is authorized to put an end to the same in a legal manner, not passing beyond the exigencies of the case. He can invoke the aid of a policeman to arrest the parties, instead of attempting to enforce legal rights himself, as thereby there will be less danger of breach of the peace. *Heirs of Koerber vs. New Orleans Levee Board*, 51 La. An. 524 (25 Sou. 415).

Owners at first nearly always look with some disfavor upon the laying of a public road through their premises. It is a natural feeling. The reasons prompting them are worthy of the most careful consideration, for it is their own; but the law steps in at times and requires them to yield their rights to public necessity. The necessity of a public road

is undeniable. *Maginnis vs. Police Jury*, 106 La. 296 (30 Sou. 846).

Although there is no statute regulating the expropriation of the crossing of one railroad by another, the general statute upon the subject will afford the right to obtain crossing when the business of the road and of the public are in need of a new depot. Rights of way are acquired subordinate to the public's right to other roads. The test is necessity and public interest. The right of the road at the place selected will not be more materially impaired than it would be if another place for the crossing be selected. *H. & S. Ry. Co. vs. K. C. S. & V. Ry.*, 109 La. 581 (33 Sou. 609).

Section 12 of Act 37 of 1877 (defendant's legislative charter), in providing that defendant "shall be sued only at its domicile, except in actions of trespass," was not intended to prohibit the institution of proceedings which are not ordinary suits, but are proceedings *in rem*, in parishes other than of defendant's domicile, for the expropriation of property there situated. *Iberia, St. M. & E. Ry. Co. vs. M. L. & T. R. & S. S. Co.*, 129 La. 493 (56 Sou. 417).

Refer to Arts. 2628, 2629, 2641.

Art. 2627. See Art. 2626, 129 La. 502.

The use of a team track and delivery space of a railroad company was not shown so essential as that it would result in impairing defendant's franchise and use in case another railroad is permitted to use three feet for clearance space, which clearance does not interfere with the running of defendant's trains, nor to an irremediable extent with the use of defendant's team track and delivery space. *Shreveport & R. R. V. Ry. Co. vs. St. L. & S. W. Ry. Co.*, 51 La. An. 814 (25 Sou. 424).

Art. 2628. See Art. 2626, 129 La. 502.

Art. 2629. See Art. 2626, 129 La. 502.

Art. 2630. See Art. 2626, 129 La. 502.

While the discretion of Police Juries in respect of the establishment of public roads is not an arbitrary one, the Courts will not interfere with the same unless there appear a clear case of its abuse. Act No. 117 of 1886 and Act No. 96 of 1896, amending Sec. 1479 of the Revised Statutes,

which is identical with Art. 2630 of the Civil Code, had the effect of likewise amending and re-enacting the latter, even though it were not referred to in the amending acts. *Fuselier vs. Police Jury*, 109 La. 551 (33 Sou. 597).

The State has imposed upon itself, and upon the political corporations established by it, the same conditions in respect to the exercise of the power of eminent domain as are imposed upon other corporations to which the power is granted. The mere determination of the State or of a political corporation to expropriate property does not divest the title of the owner; and the Courts ought not at that stage to interfere with the owner's dominion, save to the extent necessary for the ultimate accomplishment of the purpose contemplated by the proposed expropriation. *State vs. Ellis, Judge*, 113 La. 555 (37 Sou. 209).

A judgment rendered in an expropriation suit against an interdict without the intervention of a jury, and pursuant to an agreement between the wife of the interdict, as curatrix, and a railroad company, is absolutely null and void as to the person interdicted. Two years' prescription does not run. *Salier vs. St. Louis, W. & G. Ry. Co.*, 114 La. 1090 (38 Sou. 868).

To hold that the Legislature intended the word "taking," as used in the act of 1896, to mean an unlawful appropriation of lands, and that this term was interpolated in the text to enable corporations to acquire title by the short prescription of two years, will be tantamount to declaring the act unconstitutional, as no such object is expressed in the title. The short prescription of two years applies only when there has been a judgment of expropriation and the corporation has entered into possession before the payment of the compensation awarded. *Amet vs. T. & P. Ry. Co.*, 117 La. 455 (41 Sou. 721).

The property in dispute was taken possession of by defendant without objection from the plaintiff's author. The plaintiff is without right to put an end to that part of defendant's road over the right of way in possession of defendant. The use was for the public-service corporation, as admitted by defendant, and not for a private-service corporation, as argued. Two years' prescription applies. *Tre-*

mont & Gulf Ry. Co. vs. L. & A. Ry. Co., 128 La. 299 (54 Sou. 826).

Refer to Arts. 2631, 2633, 2634, 2635, 2636, 2639, 2640, 3522, 3536.

Art. 2631. See Arts. 2630 and 658, 109 La. 554.

Under Act No. 21, p. 258, of 1878, Extra Session, incorporating the L. W. Ry. Co., the mandate of the commissioners who are to act in expropriation proceedings is broader than that of the jury of property-holders authorized in similar proceedings under the general law. The Supreme Court is not permitted to close its eyes to patent errors, whether they be committed in expropriation or other proceedings, and verdicts and findings for excessive amounts will be set aside. *L. W. Ry. Co. vs. La. Central, L. & I. Co.*, 119 La. 928 (44 Sou. 732).

Refer to Arts. 2632, 2636.

Art. 2632. See Art. 2631, 119 La. 931.

The provisions of the Civil Code relative to juries of freeholders in expropriation suits have not been amended or repealed by the general jury act of 1898, No. 135, p. 216. A special statute enacted on a particular matter is not affected by a general statute, subsequently enacted, on the same subject-matter, containing different provisions. *Cumberland T. & T. Co. vs. M. L. & T. R. & S. S. Co.*, 112 La. 287 (36 Sou. 352).

Although the jury of freeholders are chosen as experts, and, as such, may take into consideration their own information outside of the testimony in the case, and also their own opinion, in arriving at the conclusion, yet it is error to charge them that they may disregard the testimony in the case. The language is too broad. The most that they can be told is that they may rely upon their own information and opinions, as well as upon the testimony. *City of Shreveport vs. Youree*, 114 La. 182 (38 Sou. 135).

The value of the land expropriated and the damages occasioned could easily be taken as one item. Experts can appraise lands, after having heard the evidence, without going to the place where the property is. *L. R. & N. Co. vs. Kohn*, 116 La. 159 (40 Sou. 602).

The jury of freeholders in an expropriation case should be taken as much as possible from the vicinage. His being the brother of one of the counsel in the case is not good

ground for recusing a juror. So long as assessments are not made at the market value of property in this State, the offering of them for the purpose of showing value in expropriation cases will be useless incumbering of the record. *L. R. & N. Co. vs. Morere*, 116 La. 998 (41 Sou. 236).

The general law in civil suits, differently drawn from the method followed in drawing a special jury in an expropriation suit, has no application. The verdict of the jury in an expropriation suit, although entitled to great weight, is subject to amendment on appeal, and is clearly contrary to the weight of the evidence. *O., G. & N. E. Ry. Co. vs. St. Landry Cotton Oil Co.*, 121 La. 796 (46 Sou. 810).

Art. 2633. See Art. 2630, 109 La. 554.

In an expropriation the value of the property must be estimated as of the time of the taking, and not as of the time before the public improvements for the purpose of which the property is being taken were proposed, deducting, however, the increment in value resulting from the proposed improvements. *O., G. & N. E. Ry. vs. St. Landry Cotton Oil Co.*, 118 La. 290 (42 Sou. 940).

Art. 2634. See Art. 1160, 109 La. 168; Art. 2630, 109 La. 554; Xavier Realty Co. vs. L. R. & N. Co., 114 La. 973.

Usurpations and wrongs to rights of private property cannot be justified by considerations of benefit to commerce; and the right of expropriation can only be exercised according to the forms of law. A deposit of money in the hands of the Sheriff, subject to the order of the owner of the property sought to be expropriated, does not authorize the plaintiff to take possession of the property before the verdict. *State ex rel. Cotting vs. Judge*, 104 La. 74 (28 Sou. 977).

When, in such a case, the railway company moves to dissolve the injunction on the ground that the price of expropriation has been paid, and the Judge orders the dissolution on bond, and thereupon plaintiff in injunction moves for a suspensive appeal, prohibition will not lie to prevent the Judge from granting the appeal. An injunction suit against trespass is no impediment to subsequent expropriation proceedings or the exercise of rights of property ac-

quired thereunder. *Xavier Realty Co. vs. L. R. & N. Co.*, 114 La. 484 (38 Sou. 427).

The fact that under Arts. 2636 and 2637 of the Civil Code a defendant, on filing either of the defenses contemplated by those articles, may, perhaps, appeal suspensively from the judgment of expropriation, and that Art. 2634 may be modified to that extent, does not justify the conclusion that the latter article is repealed obrogated in so far as it allows the plaintiff an appeal upon the question of the amount of the damages assessed, notwithstanding the payment or deposit of such amount. *N. O. Terminal Co. vs. Firemen's Charitable Co.*, 115 La. 441 (39 Sou. 433).

Expropriation proceedings are to be tried summarily; and a defendant who waits until the jurors have been assembled and the case has been called for trial to present an exception involving questions of fact as well as law has no right to insist upon a separate trial of the same before the Judge. *L. & A. Ry. Co. vs. Moseley*, 117 La. 313 (41 Sou. 585).

In expropriation proceedings by a railroad company to acquire a right of way, defendant cannot urge as a defense that the railroad company has forfeited its franchise for failure to observe a city ordinance under which it holds by seeking to acquire a right of way in a different location than that provided in the ordinance. Power to compel compliance with such ordinance rests in the city. *L. & N. W. Ry. Co. vs. Nelson*, 128 La. 391 (54 Sou. 917).

Refer to Arts. 2636, 2637.

Art. 2635. See Arts. 2630 and 658, 109 La. 554.

Art. 2636. See Art. 2630, 113 La. 556; Art. 2634, 115 La. 441; Art. 2631, 119 La. 931.

Art. 2637. See Art. 2634, 115 La. 441.

Article 2637 of the Civil Code and Sec. 1486 of the Revised Statutes apply to expropriation proceedings prosecuted for railroad and canal purposes, and do not apply to one, the purpose of which is to widen a public street. *City of Shreveport vs. Noel*, 114 La. 187 (38 Sou. 137).

The requirement contained in Art. 2637, concerning dwelling-house, yard, garden, and other appurtenances, is not intended to be applied to a tenement bought and held

merely as an investment, and which the owner himself has never occupied as a dwelling. *L. & A. Ry. Co. vs. Moseley*, 117 La. 313 (41 Sou. 585).

The property (yard of a dwelling) may be expropriated if the jury finds that it is absolutely necessary; and that was the issue covered by the verdict, which condemned the property. *L. & N. W. Ry. Co. vs. Nelson*, 128 La. 396 (54 Sou. 917).

Art. 2638.

By failing to tender before suit the true value of the property sought to be expropriated, the plaintiff in such suit incurs no other penalty than the obligation to pay costs. *City of Shreveport vs. Noel*, 114 La. 187 (38 Sou. 137).

Art. 2639. See Arts. 2630 and 658, 109 La. 554.

Art. 2640. See Arts. 2630 and 658, 109 La. 554.

Art. 2641. See Art. 2626, 51 La. An. 528.

Art. 2642. See Art. 1986, 126 La. 97; Art. 2656, 129 La. 383.

Art. 2643. See Succession of Sinnott vs. Bank et al., 105 La. 712; General Electric Co. vs. Board of Assessors, 121 La. 126.

An assignment of a judgment has no effect against third persons until notified to the debtor. Where there are two assignments of the same judgment, the first notified to the debtor will have priority. *Geisenberger vs. Cotton*, 116 La. 651 (40 Sou. 929).

Art. 2646. See Art. 2504, 122 La. 333; Art. 2475, 126 La. 381.

The stockholder of defendant company was a third person, notwithstanding his unsuccessful attempt to become a party to the suit; secondly, the vendor of the notes, both as defendant in the suit for diminution and as warrantor on the notes, had an interest in maintaining the judgment appealed from; and the failure to cite him was fatal to the appeal. *Massie vs. Louque*, 109 La. 769 (33 Sou. 764).

Art. 2652. See *Viguerie vs. Hall et al.*, 107 La. 775; **Art. 2447**, 110 La. 889.

The law is that, in order that a debtor owing a claim that is litigious may obtain his release, he shall pay to the transferee the real price of the transfer. The transferee did not pay anything for the claim. No price could be tendered, and, in consequence, no release could be obtained. Speculation in suits is sought to be restrained. The gratuitous transfer of a litigious claim in good faith is not considered, under the terms of the law, in the light of the purchase of a suit for speculative purposes. *Ice & Distilled Water Mfg. Co. vs. Anderson*, 106 La. 97 (30 Sou. 272).

The right conferred in Art. 2652 can only be exercised *pendente lite*. *L. & L. & G. Ins. Co. vs. Board of Assessors*, 122 La. 96 (47 Sou. 413).

Art. 2653. See **Art. 2447**, 110 La. 889, and 122 La. 96.

Art. 2654.

It will not be disputed that a written order by a creditor, addressed to his debtor, directing him to pay to a third person a debt due to the former, accompanied by due notice to the debtor, would comply with all the requirements of the Code for the valid assignment of the credit. The fact that the debt which formed the consideration of the transfer was in no part mature, and was in part not yet in existence, can make no difference. *Cox vs. First National Bank*, 126 La. 97 (52 Sou. 227).

Art. 2655. See **Arts. 2646, 1526 and 1764**, 107 La. 406;

Maestri vs. Board of Assessors, 110 La. 521;
Hearsey vs. Craig, 126 La. 833.

Art. 2656. See *Hearsey vs. Craig*, 126 La. 833.

There is no *dation en paiement* as relates to third persons unless the property donated in satisfaction of a debt is delivered. *Hughes vs. Mattes & Old Bangor Slate Co.*, 104 La. 218 (28 Sou. 1006).

Article 2656 has no application in a case where a third person holds adverse possession of immovable property which is given in payment by public act, the donor of which delivers possession as he has it, and the defendant in the petitory action resisting the demand of the donee for pos-

session sets up the non-delivery, for which he alone is responsible. *Sorrel vs. Hardy*, 127 La. 844 (54 Sou. 122).

Under Arts. 2642 and 2656, providing that delivery of an incorporeal right may be effected by the giving of title, and declaring that without delivery there is no giving in payment, a giving by a debtor and a receipt by the grantor of open accounts is a nullity without notice to the debtors on the accounts; "title" meaning the material evidence of the incorporeal right, and an open account not being evidenced by such title as may serve for the purpose of delivery. *Lehman Dry Goods Co. vs. Lemoine*, 129 La. 383 (56 Sou. 324).

Refer to Arts. 2642, 3452.

Art. 2658. See *Hearsey vs. Craig*, 126 La. 833.

Where a railroad contractor assigns his future earnings under a contract to a bank to cover money due and future advances, and the assignment is a valid transfer or sale of credit, money paid by the railroad to the bank by virtue of the assignment when the contractor was insolvent is not subject to a revocatory action, since, by the express provisions of Arts. 1986 and 2658, a past-due debt paid by an insolvent in money is valid. *Cox vs. First National Bank*, 126 La. 89 (52 Sou. 227).

Art. 2659. See Arts. 2464, 1526 and 1764, 107 La. 406;

Hearsey vs. Craig, 126 La. 833.

Art. 2662.

A person who enters upon the land of another and appropriates the timber thereon under circumstances justifying the conclusion that, if he did not know that he was without right so to do, it was because he did not choose to know it, is a mere trespasser, and is liable in damages. *Saunders vs. Ditch*, 110 La. 884 (34 Sou. 860).

Art. 2664.

An unrecorded deed to real estate is an utter nullity in so far as the rights of third persons are concerned. It stands as if not written. If the vendee under such a title transfers the property to a third person, and the transfer is recorded, this does not have the effect of operating the registry of such unrecorded deed. *John T. Moore Planting Co. vs. Morgan's L. & T. R. & S. S. Co.*, 126 La. 840

(53 Sou. 22). [Overruling *Collinsworth vs. Wilson*, 32 La. An. 1012.]

Art. 2666.

One of the principal effects of an exchange is that the thing received is subrogated in full right to that which is alienated. Hence, when the husband exchanges his separate immovable property for other like property, the property received by him acquires the status of that alienated. Nor does it affect the question that he may give money "to boot" where the main consideration moving from him is the real estate; though in such case, in the absence of proof that the money was his separate property, he and his estate become indebted to the community for the amount. *Dillon vs. Freeville*, 129 La. 1006 (57 Sou. 316).

Art. 2668. See *Reynolds vs. Egan*, 123 La. 309.

Art. 2669.

The defendants set up another claim for the rent of the land; but, as there was previously to the sale no privity of contract between them and the plaintiff, the case is not one of letting and hiring. (Art. 2669.) The claim is one in the nature of damages for the wanton detention of property. (*Wilson vs. Benjamin*, 26 La. An. 588.) *Voiers vs. Atkins Bros.*, 113 La. 342 (36 Sou. 974).

Art. 2670.

The exclusive privilege vested in the plaintiff to furnish the ground to build a public market, and then operate it for twenty-five years by renting stalls and collecting the revenues, the ground and market-house to be conveyed to the city at the beginning, and to accrue to the city in full ownership at the end, of the period fixed for the privilege, is a franchise taxable under the revenue laws of the State, and not a lease, because a price is essential in a lease. *Maestri vs. Board of Assessors*, 110 La. 517 (34 Sou. 658).

Where, in a preliminary agreement for the lease of real estate, whether such agreement be verbal or in writing, it is stipulated that the lease shall be reduced to writing, the contract of lease is not completed until the writing is made and signed; and until then either party may withdraw. *In re Woodville*, 115 La. 810 (40 Sou. 174).

Refer to Art. 2671.

Art. 2671. See Art. 2670, 110 La. 521; Art. 2675, 129 La. 23.

Art. 2672. See Art. 2675, 129 La. 20.

Art. 2674.

To the plaintiff's petitory action the defendant answered he held the land under lease from the heirs of Bogart, but did not disclose their names or domicile. The heirs were not made parties. There was judgment awarding plaintiff, on his showing of title, possession as against the lessee, but rejecting his demand in all other respects. Having prayed to be declared the owner, this judgment disallowed his demand of ownership. *Held*, that, as he sued for the ownership of the land, and for the possession thereof as an accessory to such ownership, there is error in the judgment which, while awarding him possession, rejects his claim of ownership. *Byrne vs. Hebert*, 51 La. An. 555 (25 Sou. 586).

The stipulation that when the defendant "shall begin such operation it shall have the right to make such successive attempts to find oil as it may desire," does not mean that the term of the lease is for an uncertain time; but must be held to be for the two years intended by the contract, though not expressly stated. *Cooke vs. Gulf Refining Co. of La.*, 127 La. 592 (53 Sou. 874).

Refer to Art. 488.

Art. 2675.

A mere expression on the part of a deceased person of her intention to provide for a friend in her will does not form the basis of a contract; nor is it a will. In a lease for services there must be a term, which cannot exceed five years. (Arts. 2746, 167.) *Caldwell vs. Turner*, 129 La. 20 (55 Sou. 695).

Refer to Arts. 2671, 2672.

Art. 2679. See Art. 2317, 111 La. 428.

Art. 2681. See Art. 1896, 105 La. 25.

Art. 2682. See Art. 1896, 105 La. 25.

As between lessor and lessee, the law recognizes the validity of a lease by one person of the property of another; and it is well settled that he who enters upon and enjoys the possession of property as lessee cannot, by way of defense to an action to enforce the obligations of his lease, contest the title of his lessor, even though he himself may have acquired an adverse and better title. *Town of Morgan City vs. Dalton*, 112 La. 9 (36 Sou. 208).

Art. 2692. See Art. 491, 118 La. 1010; Art. 2695, 122 La. 835; Art. 1933, 123 La. 309.**Art. 2693. See Art. 2700, 116 La. 357; Art. 2700, 116 La. 103.**

A stipulation that the lessee shall make all necessary repairs, present and future, for the term of one year, does not dispense the lessor from his obligation to deliver the building in a sound condition as to its structural part, nor does it exclude the lessor's warranty against essential defects. Where a leased building collapsed by reason of rotten supports, the lessor has no claim for damages against the lessee on the latter's contract to make necessary repairs, usual decay being excepted. A lessee who might have protected himself at small cost by temporary shoring is not entitled to recover the consequential damages. *Bennett vs. Southern Scrap Material Co.*, 121 La. 205 (46 Sou. 211).

Plaintiff leased from defendant a building on R Street. The front of the lower story was made of plate glass. It was broken. The lessee notified B of that fact, and called on him to replace the front. On his refusal to do so, W replaced the front at what is conceded a reasonable sum, then brought suit against the lessor for reimbursement. Judgment for plaintiff. *Weil vs. Bonart*, 124 La. 693 (50 Sou. 655).

Articles 2693 and 2694 are pertinent and govern, and not Art. 2695, touching guarantees of lessor against vices and defects.

The head of a family represents the family. If he, a tenant, is without a right of action because of his failure

to make the repairs, although he had the right to make them, the members of the family occupying the dwelling are equally as concluded. *Brodtman vs. Finerty*, 116 La. 1103 (41 Sou. 329).

Refer to Arts. 2694, 2695, 2699, 2716.

Art. 2694. See Art. 2693, 116 La. 1103.

The alleged failure of the lessor to make necessary repairs is no justification for a refusal by the lessee to pay the monthly rent as it accrues. The right of the lessee to retain rents for the purpose of making indispensable repairs does not arise until after notice to the lessor to make such repairs and after his refusal to make them; and is restricted to rents becoming due subsequent to the lessor's default. *Mullen vs. Kerlee*, 115 La. 783 (40 Sou. 46).

The owner was not called upon to make repairs. The tenant took no steps towards compelling the owner to make them or to make them himself. No grounds for damages. Plaintiff's wife has no good ground of complaint for damages. *BiENCHI vs. Del Valle*, 117 La. 587 (42 Sou. 148).

Art. 2695. See Art. 2316, 112 La. 202; Art. 2693, 116 La. 1103; Art. 2700, 116 La. 375; Art. 2693, 121 La. 208.

Two leases of the same property were made between the same parties, the first for the single month of February and the second for seven months. A right was granted in the second lease to make the repairs needed to place the premises in proper condition. The lessee, to the knowledge of the lessor, made repairs during the first lease. Before the expiration of the first lease the building was condemned by the city authorities and demolished, both leases being dissolved. *Held*, the lessor is liable to the lessee for the expenditures made by the latter for repairs and other necessary purposes. The prematurity *quoad* the commencement of a second lease in the making of the repairs is no bar to the recovery for the outlays made for that purpose. *Pierce vs. Heddin*, 105 La. 294 (29 Sou. 734).

We cannot construe Art. 2700 so as to nullify the lessor's warranty in Art. 2695. *Goldsmith vs. Virgen*, 122 La. 835 (48 Sou. 279); *Levy vs. Madden*, 116 La. 378.

Refer to Arts. 2692, 2700.

Art. 2696. See Art. 1760, 105 La. 25.

Art. 2697. See Art. 1933, 108 La. 655, and 123 La. 306.

Art. 2699. See Art. 1933, 123 La. 306; Art. 2693, 124 La. 694.

Art. 2700. See Art. 2695, 122 La. 835; Art. 1933, 123 La. 306.

Where the defective condition of a brick wall in a leased storehouse rendered it dangerous to life and property, and necessitated its reconstruction by the lessor: *Held*, that the lessee is entitled to recover actual and direct pecuniary loss occasioned by the work of reparation in addition to the reduction of rent. *Levy & Co. vs. Madden*, 116 La. 374 (40 Sou. 766).

Refer to Arts. 2693, 2695.

Art. 2701. See Art. 1760, 105 La. 25; Art. 2494, 110 La. 1000.

Art. 2703.

The lessor is not bound to guarantee the lessee against disturbance caused by persons not claiming any right to the property leased; but he is bound to protect the lessee in the quiet enjoyment of such property as against persons who set up such claims; and in either case the possession of the lessee is the possession of the lessor, and the disturbance of one is the disturbance of the other. *Bright vs. Bell*, 113 La. 1079 (37 Sou. 976).

In Art. 2703 the acts referred to are tortious acts of third persons. A lessee is accorded by law a direct action himself against the author of such disturbances, and he should avail himself of that right of action for protection and relief. Failing to do so, he cannot throw upon his lessor the injurious results flowing from such disturbances and making him liable for the same through an action for damages. *Reynolds vs. Egan*, 123 La. 295 (48 Sou. 940).

Refer to Arts. 2704, 2729.

Art. 2704. See *Byrne vs. Hebert*, 51 La. An. 553; Art. 2703, 113 La. 1090.

Where, during the negotiations leading to a written contract of lease of the lower floor of a building, and after

the contract has been signed and the lessee has installed himself, particular requests are granted, but nothing is said as to the stairway leading to the floors above, or display of signs of tenants above, it will be presumed that the lessee acquiesced in considering the condition then existing as to the upper floor, and he cannot be heard afterwards that his lease entitled him to have such condition changed, nor can he successfully demand a diminution of his rental. *Rojas & Conner vs. Seeger*, 122 La. 218 (47 Sou. 532).

Art. 2705.

The appointment, under a State law, in a State court, of a receiver to a corporation is valid, and the administration of the receiver continues to be valid until the jurisdiction of the Court is ousted by the filing of a petition to force the corporation into involuntary bankruptcy, followed by the adjudication in bankruptcy; and where a lessor has proceeded, in the receivership, to enforce his claim and lien arising out of the contract of lease, antedating by more than four months the filing of the petition in bankruptcy, for rent not yet due against the proceeds in the hands of the receiver of the property found on the leased premises, the jurisdiction of the State Court *quoad* such claim and lien is not ousted by the filing of such petition, nor does the bankruptcy law dispossess the State Court of the property upon which the lien bears, though there was no rent actually due at the time that the lessee was adjudicated a bankrupt. *Trager Co. vs. Cavaroc Co., Ltd.*, 123 La. 319 (48 Sou. 949).

Refer to Art. 3218.

Art. 2706.

The right of pledge is restricted to the amount owing by the sub-lessee at the moment of the seizure, and cannot be extended by implication to future rents. The measure of the lessor's pledge is the sum of rents that have accrued to date of seizure, although the same may not then be exigible under the terms of the sub-lease. The statutory right of pledge of the lessor on the effects of the sub-lessee cannot be affected by the circumstance that the sub-lessee has given to the principal lessee negotiable notes for the rents accruing from month to month, and that said notes are outstanding in the hands of third persons. *Tulane Imp. Co.*

vs. W. B. Green Photo Supply Co., 124 La. 619 (50 Sou. 601).

Art. 2710. See Art. 2052, 115 La. 194.

In leases of movables, when the lessee abandons possession, there is nothing to provisionally seize; and the remedy of the lessor is by personal action for the rent as it accrues or for a dissolution of a contract with damages. The obligation of the lessee is to pay the rent at the terms agreed on. *American Machinery & Construction Co. vs. Stewart & Haas*, 115 La. 194 (38 Sou. 960).

Art. 2716. See Succession of Meteye, 113 La. 1019; Art. 2693, 124 La. 694.

Art. 2718. See Succession of Meteye, 113 La. 1019.

Art. 2719.

The obligation to return the property must be taken as subject to the condition relating to wear and tear. The accident was not due to the negligence of defendant, and is to be considered in the light of an unavoidable accident. The testimony does not show that the lessee omitted to do an act he was called upon to do. If there was anything omitted, the plaintiff did not object; he assented. *D'Echaux vs. Gibson Cypress Lbr. Co.*, 114 La. 626 (38 Sou. 476).

Refer to Art. 2723.

Art. 2720.

No inventory having been taken, the plaintiffs urge that the presumption stated in Art. 2720 was controlling. The testimony rebuts the presumption. It does not appear that the plantation was in very good condition just prior to the lease nor at the end of the lease. *Farwell vs. Ellington Planting Co.*, 123 La. 280 (48 Sou. 935).

Art. 2723. See Art. 2719, 114 La. 629.

Art. 2726.

The additions and improvements which the tenant is entitled to remove under Art. 2726 are liable for arrears of rent. *Davidson vs. Fletcher*, 130 La. —— (58 Sou. 504).

Art. 2729. See Art. 2703, 123 La. 309.

The lessees were entitled to judgment for the amount they would have earned during the remainder of the term of the lease. They are also entitled to damages *ex delicto*. To the extent that a violation of contract is an act *ex delicto*, exemplary damages may be recovered. *Waller & Edmonds vs. Cockfield*, 111 La. 596 (35 Sou. 778).

Art. 2740. See Art. 1268, 108 La. 73.**Art. 2742. See Art. 501, 113 La. 579.****Art. 2743. See Art. 1933, 108 La. 654.****Art. 2746.**

Section 1 of Act 301 of 1908, p. 453, entitled "An act to regulate the employment of children, young persons and women," etc., is a valid and constitutional exercise of legislative power. Said section makes it unlawful for any person to employ any child under the age of fourteen years "to labor or work" in any mill, factory, mine, mercantile establishment, etc., or in any theatre, concert hall, etc. *Held*, that the term "work" is comprehensive enough to cover any performance on the stage of a theatre by a girl ten years of age. *State vs. Rose*, 125 La. 462 (51 Sou. 496).

In a lease for services there must be a term (Art. 2746), which cannot exceed five years (Art. 167). *Caldwell vs. Turner*, 129 La. 20 (55 Sou. 695).

Art. 2747. See Art. 2315, 113 La. 395.**Art. 2748. See Art. 1897, 105 La. 688.**

The refusal to accept the services of an employee, except on conditions violative of the terms of the contract of employment, is equivalent to a discharge. In such case the employee's right to recover the salary for the unexpired term accrues at the moment of discharge, and becomes a vested right, which cannot be affected by the employee subsequently engaging his services to another, or by his refusal to return to the employment from which he had been discharged. *Curtis vs. A. Lehman & Co.*, 115 La. 40 (38 Sou. 887).

The overseer of a plantation not discharged for sufficient cause is entitled to the stipulated salary for the year,

he having been employed by the year. The absence from the place of plaintiff was passed over by the defendant, who permitted the plaintiff to continue his employment without objection. Other causes of complaint were also overlooked to an extent that they did not afford ground for the discharge. *Sharp vs. McBride*, 120 La. 143 (45 Sou. 41).

Refer to Art. 2749.

Art. 2749. See Art. 2046, 113 La. 456; Art. 2748, 115 La. 44; Art. 2748, 120 La. 148.

Plaintiff having been engaged for a year as clerk, the destruction by fire of the business house and stock of goods of the defendant, and the subsequent dissolution of the firm and its retirement from business, did not, in the absence of a reservation of the right of discharge for these reasons, absolve defendants from the obligation contracted with him to retain his services at the salary stipulated through the remainder of the year. *Madden vs. Jacobs & Co. et al.*, 52 La. An. 2107 (28 Sou. 225).

The employment by the year may be implied from the nature of the business, and a stipulation that the employee shall pay out of his commissions all expenses, including license taxes, for the ensuing year. *Woods vs. M. A. Shumard & Co.*, 114 La. 451 (38 Sou. 416).

In order to warrant the discharge of the manager of a corporation, whose services had been employed for a fixed time and at a fixed price, before the expiration of the time agreed upon, there should exist grounds of complaint against him of a serious character. *Berlin vs. P. L. Cusachs Co.*, 114 La. 744 (38 Sou. 539).

The settled jurisprudence is that this right of action accrues immediately upon the discharge, and by the fact of the discharge; so much so that the employee is free from that moment to employ his time elsewhere without detriment to his suit. *Daspit vs. D. H. Holmes Co.*, 120 La. 92 (44 Sou. 996).

Under Art. 2749, a servant discharged without any serious ground of complaint may recover the salary for the unexpired term. But this article is in the nature of a penal statute, and has no application to contracts for hiring purely executory in their nature. *Lloyd vs. Dickson et al.*, 121 La. 915 (46 Sou. 919).

This article applies only to contracts for personal services, and does not justify a recovery for breach of a contract for package-delivery service without proof of actual damages. *Long vs. Charles Kaufman*, 122 La. 282 (47 Sou. 606).

Where an actor employed for the season is discharged without cause before the close of the season, the fact that he may elsewhere earn money during the unexpired term of his contract has no bearing, under the law, upon his right to recover his salary for such unexpired term. *Camp vs. Baldwin-Melville Co.*, 123 La. 258 (48 Sou. 927).

An attorney at law employed for an indefinite period and for a contingent fee is a mandatary whose power is revocable, as it is not coupled with an interest in a cause of action; and the principal may terminate the relationship of attorney and client at will. This is governed by Art. 3028, and not Art. 2749. *Louque vs. Dejan*, 129 La. 519 (56 Sou. 427).

Refer to Arts. 2750, 3028.

Art. 2750. See Art. 2315, 113 La. 391; Art. 2749, 115 La. 44; Art. 2746, 125 La. 466.

Art. 2751.

Where cotton on a railroad platform in course of delivery was damaged by fire, the cause of which is not shown or explained, proof of the usual and ordinary diligence in such cases to safeguard the cotton will not avail the carrier as a defense. Besides proof of loss and diligence, the law requires the carrier to prove that the fire was purely accidental and impossible to prevent. This necessarily involves proof of the cause or origin of the fire; and, in the absence of such proof, the loss will be imputed to the fault of the carrier. *Lehman, Stern & Co. vs. M. L. & T. R. & S. S. Co.*, 115 La. 1 (38 Sou. 873).

Refer to Art. 2754.

Art. 2754. See Art. 1933, 108 La. 655; Art. 2751, 115 La. 1.

The rigor of the rule announced in Art. 2754, touching the burden of proof of carriers, is to some degree relaxed in the case of damages to passengers from what it is in reference to things in their care. *McGinn vs. N. O. Ry. & L. Co.*, 118 La. 812 (43 Sou. 450).

Where a carload of mules was shipped by rail under a special contract, by which the shipper assumed all risk of injury, loss or damage which the animals might suffer from certain causes, and all other damages incidental to railroad transportation which shall not have been caused by fraud or gross negligence of the railroad company: *Held*, that proof that the carrier was not negligent in any respect in handling the car is a sufficient defense, since all other risks were assumed by the shipper; and that the reduced rate of freight and a free passage to the shipper were a sufficient consideration for the contract. *Simms & Son vs. N. O. & N. E. Ry. Co.*, 122 La. 268 (47 Sou. 602).

Where a passenger was injured without his fault by the derailment of a railroad train, the defendant must show, to rebut the presumption of negligence, that the accident resulted from circumstances against which human care and foresight could not guard. In the absence of evidence showing the particular cause of the derailment of the train, the Court is unable to say that it was the result of an accident which could not have been foreseen or prevented by the railway. *Reems vs. N. O. G. N. Ry. Co.*, 126 La. 511 (52 Sou. 681).

Art. 2756.

Under this contract the timber to be cut and all necessary tools and appliances and means of transportation were furnished by defendant. Baptist furnished superintendence and labor. This contract was not a lease, but a hiring of labor or work by the job. *Brady vs. Jay*, 111 La. 1075 (36 Sou. 132).

Art. 2758.

The statement now before us sets forth that relator agreed to pay the sum of \$480 for a showcase made at plaintiff's factory; that the showcase was set as agreed upon, and there remained only the glass to be fitted in; that the glass was in a box on the premises in sizes to suit, and the fitting could be done in two hours. A fire occurred, damaging the building, but doing no damage to the showcase or to the glass. The day after the fire plaintiff offered to put the glass in place, but defendant told him not to do so, and that the bill would be paid. This comes within Arts. 2758

and 2759. Judgment for defendant. *Hinnricks vs. Mon-
telephone*, 51 La. An. 897 (25 Sou. 546).

Refer to Arts. 2759, 2765.

Art. 2759. See Art. 2758, 51 La. An. 897.

Art. 2762.

The meaning of Arts. 2762 and 3545 will be construed strictly as against the surety on a builder's bond. *Police
Jury vs. Johnson*, 111 La. 279 (35 Sou. 550).

Art. 2765. See Art. 2758, 51 La. An. 897.

The proprietor who exercises the right accorded him by Art. 2765 must pay the contractor for all expenses incurred and for all labor done, and, in addition, all damages his act may have caused, such as the loss of the profits the contractor would have made if he had been permitted to complete the building; but he is not liable for such consequential damages as the loss of reputation and credit the canceling of the contract may have caused to the contractor. *Dugue vs. Levy*, 114 La. 21 (37 Sou. 995).

When the proprietor exercises the right accorded him by Art. 2765, he does not violate the contract, but merely exercises a legal right which he has under the contract. Hence, in such a case, the contractor cannot recover damages as for breach of contract, but only such amount as he may be entitled to in pursuance of the contract; and that amount is the expenses incurred by him up to date, plus such profits as he can show he would have made if permitted to complete the contract. *Cusachs & Co. vs. Sewer-
age & Water Board*, 116 La. 510 (40 Sou. 855).

Art. 2772.

A contractor having engaged to construct a courthouse, and pledged his contract to a bank with full subrogation of his lien and privilege, in order to obtain advances of money to carry same to completion, and subsequently bought materials for the construction upon terms of credit in another State, which were actually used therein, the furnishers of material are entitled to preference in receiving payment over the bank as assignee, irrespective of the place where the contract for materials was entered into; they having made out and served attested accounts upon the

proper authorities. *Pullis Bros. Iron Co. vs. Parish of Natchitoches et al.*, 51 La. An. 1377 (26 Sou. 402).

The property was sold and delivered in another State. The contract is classed as foreign, and retains all the rights covered by the contract at the time made as to remedies; and, as to remedies, all remedies are here for enforcement. As to "right" under the contract, State action will not add a right to it which it did not have before it was brought into the State. Privilege and bonds do not secure the price of material sold and delivered in another State, which is there worked up into different shapes for the interior finish of a house, and which, owing to accident, finds its way into this State. *Willey vs. St. Charles Hotel Co. et al.*, 52 La. An. 1581 (28 Sou. 182).

The contractor who has seen the work performed and the material furnished in constructing the building is not in a situation to deny his liability on the ground that he has not been notified. The surety on the bond is held for the same liability. *Brink & Neeland vs. Bartlett et al.*, 105 La. 336 (29 Sou. 958).

Where the furnisher of supplies to a sub-contractor for the construction of a building waives any claim to a privilege upon the building and relies, under the Act of 1844, upon a right upon the price due by the owner to the contractor, he must comply with the conditions of that statute and serve an "attested account," as required by its terms. The recording of an "attested account" in the Recorder's office is not equivalent, for the purposes of a right upon the fund, to the service upon the proper party of an attested account. It does not, for this purpose, convey constructive notice. *Engineering Co., Ltd., vs. Crowley*, 105 La. 615 (30 Sou. 222).

The owner who pays an amount to his contractor after having received notice of a contested account of the laborer or materialman may be held liable for the amount, although he may not have served a copy on his contractor, as he should have done. [Decision in *Schwartz vs. Cronen*, 30 La. An. 995, overruled.] One of the plaintiffs, a member of the firm, claims for labor and material; at the same time he claims to have been released from his liability as surety on the bond. His firm is entitled to recover the amount of its claim. *Vordenbaumen & Eastham vs. J. M. Bartlett*, 105 La. 752 (30 Sou. 219).

The service of the account and judgment of the Court had the effect of a stizuer of money. The subsequent payment of the firm's claim was, in legal contemplation, through the owner, a payment of this debt, by the contractor himself, out of his own funds in the hands of the owner. The bond contains dual obligations—one protected by general law, and the other to insure performance of the contractor under the special statute. *Neith Lodge No. 21, I. O. O. F., vs. Vordenbaumen*, 111 La. 213 (35 Sou. 524).

In order to preserve his privilege for the price, one who furnishes to the owner material used in the construction of a building must record the detailed statement or acknowledgment required by Art. 3272 of the Civil Code. A statement showing merely the total amount charged, with payments and credits, on account, and the balance due, is not the detailed statement so required. *Shreveport Nat. Bank vs. Maples*, 119 La. 41 (43 Sou. 905).

One whose claim was for materials furnished for extra work could not complain on appeal that the amount established as due from the city was too small for the value of the extra work done where, if that amount were added to the city's admitted liability, there would not even then be enough to satisfy the claims prior to that of the objector. *National Iron Wks. vs. City of Monroe*, 127 La. 277 (53 Sou. 563).

Refer to Arts. 2775, 3051, 3249, 3272, 3273, 3274.

Art. 2775. See Art. 2772, 52 La. An. 1586, and 119 La. 47.

Art. 2779.

A contractor who conveys a lot of ground to another "for and in consideration of the price and sum of \$600 paid to the vendor, receipt acknowledged, and acquittance in full granted," followed by a paragraph which recites "the purchaser obligating himself, his heirs and assigns, to keep and support the vendor and her husband during their life," is a contract of sale, and not a contract of rent, as defined by Art. 2779. *Chenebert, Wife, etc., vs. Lemoine et al.*, 52 La. An. 587 (27 Sou. 56).

Refer to Art. 2786.

Art. 2786. See Art. 2779, 52 La. An. 592.

Art. 2801.

It does not necessarily follow that a partnership was formed because in a joint adventure the parties agreed each to receive a share of the profits. Persons may share profits and not be partners. The person who employs two other persons to do certain work, and who, by the terms of the agreement, retains the right to discharge them at will, may discharge one and retain the other in his employ. In that case, even if there exists a partnership between the employees, one of the employees may notify the other that the partnership is dissolved. *Leonard vs. Sparks*, 109 La. 543 (33 Sou. 594).

Refer to Arts. 2854, 2884.

Art. 2804. See Art. 1893, 128 La. 442.**Art. 2806.**

The joint purchase of property by several does not of itself constitute a partnership. *Breard vs. Blanks*, 51 La. An. 1507 (26 Sou. 618).

Art. 2807. See Weil vs. Jacobs' Estate, 111 La. 371.**Art. 2814.**

Where an action is plainly for the settlement of a partnership and for a division of profits, a prayer for general relief will authorize a decree for any balance that may be found due the plaintiff on a settlement of accounts. In the absence of express agreement, each partner is bound for his full share of the losses as shown by a general settlement of accounts; and the number of transactions involved or the assignment of one partner's right to profits in particular transactions cannot change the rule. *Stark vs. Howcott*, 118 La. 489 (43 Sou. 61).

Art. 2823.

The full names of the partners should be set out in the petition with the declaration that they were the partners composing the partnership. The suit should not be brought in the names of the individual partners. *Wolffe & Sons vs. Pants Co., Ltd.*, 52 La. An. 1357 (27 Sou. 893).

Art. 2825.

Commercial partners are bound *in solido* for all contracts within the scope and for the purposes of the busi-

ness in which they are engaged; and among the first essentials to a commercial business is the securing of a place within which to conduct it. Hence, they are bound *in solido* on a contract for the lease of such place, notwithstanding that a commercial firm, as such, cannot acquire the ownership of real estate. *Shreveport I. & B. Co. vs. Mandel Bros.*, 128 La. 314 (54 Sou. 831).

Art. 2841. See Art. 1905, 105 La. 711.

Art. 2844.

Only the fund which the partner *in commendam* has contributed, or engaged to contribute, enters into the firm; he himself does not. Hence, the firm is without authority to take him into court; and if it does, and a judgment is rendered against him personally in the suit on a conventional demand, the judgment must be considered as having been rendered without citation or equivalent notice, and to be null, and incapable of revival; and in the suit for revival the facts going to show such want of citation may be proved. *C. S. Burt & Co. vs. La Place*, 114 La. 489 (38 Sou. 429).

A partner *in commendam* is not a real partner as to third persons, and need not be joined in a suit against the firm in liquidation. *In re M. F. Dunn & Bro.*, 115 La. 1084 (40 Sou. 466).

Refer to Art. 2849.

Art. 2849. See Art. 2844, 115 La. 1087.

Art. 2854. See Art. 2801, 109 La. 549.

Art. 2872.

A partnership organized for the purpose of taking and executing a contract for the building of drainage canals is an ordinary partnership, the members of which are without authority to bind each other, unless authorized to do so, "either specially or by the articles of the partnership"; and where it is sought to make a defendant liable, as a member of such a partnership, under a contract made by another person, said to be a co-partner, the burden rests upon the plaintiff to prove the partnership and show either that defendant authorized the contract or was benefited by it, or that he estopped himself. *Jamison vs. Chas. F. Cul-lom Co.*, 110 La. 782 (34 Sou. 775).

After a partnership, whether commercial or ordinary, has been dissolved, a former member cannot bind the other former members by making a note in the firm name, whether for the creation of a new debt or the acknowledgment of an old one. *Bank of Monroe vs. E. C. Rew Inv. Co.*, 126 La. 1028 (53 Sou. 129).

Art 2876.

A partnership for the cultivation of a plantation is dissolved by the seizure of an undivided interest in the plantation, whereby the partnership is deprived of the control of the plantation. *Borah vs. O'Neil*, 116 La. 677 (41 Sou. 29).

Art. 2882. See *Weil vs. Leopold Weil Bldg. & Imp. Co.*, 126 La. 939.

A citizen may legally exchange part or the whole of the property of his estate for shares of stock in a corporation of which he is one of the organizers; and, if the charter imposes no limitation upon the power of the corporation to alienate such property, and no obligation to hold, or administer, the same for another, or deliver it to another, save the obligation which it holds to its shareholders, such disposition does not create a prohibitive substitution, or *fidei commissum*, of which a forced heir who receives his legitime in the stock of the corporation can complain, even though there be certain provisions in the charter which render it more difficult than would ordinarily be the case for him to dispose of such stock. A partnership may stipulate rights in regard to the heirs of a partner, and, by analogy, so may a corporation in regard to its stockholders. *Steeg vs. Leopold Weil Bldg. & Imp. Co.*, 126 La. 101 (52 Sou. 232).

Art. 2884. See *Succession of Becnel*, 117 La. 750; **Art. 2801, 109 La. 549.**

Art. 2886. See *Succession of Becnel*, 117 La. 750.

Art. 2888. See *Borah vs. O'Neil*, 116 La. 677.

Art. 2924. See **Art. 1935, 116 La. 346.**

This article was amended by Act 68, p. 83, of 1908, adding the following: Provided, however, where usury is a defense to a suit on a promissory note, or other contract of similar character, that it is permissible for the defendant to show said usury, whether same was given

by way of discount or otherwise, by any competent evidence.

Delay of payment of a loan obtained for a price in excess of the conventional rate of interest is held to be without legal consideration, it not being a part of a written agreement covering principal and interest capitalized. *Chadwick vs. Menard*, 104 La. 38 (28 Sou. 933).

Where, in a series of transactions, beginning with loans of money and the giving of notes, and continued by the giving of new notes in the place of those outstanding, as the latter mature, the borrower pays, in cash, in advance, usurious interest on the notes so given, so that the interest so paid or charged is not included in the notes, the transaction does not fall within those provisions of Art. 2924 of the Civil Code under which the original holder of a note may recover the full amount called for thereby, notwithstanding that there may be included therein a greater amount of interest or discount than eight per cent. per annum; and the borrower may recover so much of the usurious interest as may have been paid within twelve months prior to his making judicial demand therefor, either by direct action or by way of defense when sued on the notes. *Huntington vs. Westerfield*, 119 La. 616 (44 Sou. 317).

Act 68 of 1908, p. 83, makes no change in the usury laws as to discounts and capitalized interest permitted by Art. 2924. The proviso of said statute merely lays down a rule of evidence applicable to cases where usury is pleadable under the provisions of said article. *Roux vs. Witzman*, 125 La. 300 (51 Sou. 205).

Art. 2939. See Art. 1933, 108 La. 655.

Art. 2955.

A judicial depositary, holding property subject to the orders of the Court, has no standing to contest the validity of an order for the delivery of the deposit to a trust company appointed tutor *ad bona* on the ground that the Court has no jurisdiction to make such appointment. *Succession of Hart*, 127 La. 833 (54 Sou. 46).

Art. 2956.

The holder of the receipt is entitled to delivery of the property stored upon tender of payment of charges on the property itself; and payment of charges on other property

of the owner cannot be required before delivery. There must be a tender made in due form of the charges. Storage is due on damaged goods for which the storers are made to pay. *Marks & Rittner vs. Cold Storage Co.*, 107 La. 172 (31 Sou. 671).

Art. 2967. See Succession of Baker, 129 La. 80.

Art. 2969. See Art. 1896, 105 La. 25.

Art. 2970. See Art. 1933, 108 La. 655.

Art. 2979. See Art. 1085, 52 La. An. 1192.

Art. 2980. See Art. 1085, 52 La. An. 1192.

Art. 2981. See Art. 1085, 52 La. An. 1192.

Art. 2983. See Art. 1893, 128 La. 442.

Laws heretofore passed against gambling do not include betting on horse races in any form. Betting on horse races, in view of the bettors, is not unlawful; but, on the contrary, has the law's sanction. The question whether the betting on races at a distance, out of view, through the medium of the turf exchange, should be suppressed as being gambling is one left to the Legislature by the clear terms of the Constitution. *City of Shreveport vs. Maloney and Schulsinger*, 107 La. 193 (31 Sou. 702).

Act 206, p. 397, of 1902, conferred on municipalities having less than fifty thousand inhabitants the power to confine the poolroom business within prescribed territorial limits. The power to regulate, however, does not include the power intentionally to suppress; but, where the police power is exercised with the *bona fide* intention of regulating a business, it is lawfully exercised, notwithstanding the fact that the business may become unprofitable thereby, and perish. *City of Shreveport vs. Schulsinger*, 113 La. 10 (36 Sou. 870).

Art. 2988. See Arts. 1802 and 2040, 118 La. 946.

Art. 2989. See Arts. 1802 and 2040, 118 La. 946.

Art. 2991.

The general rule is that the contract of mandate is gratuitous; but in a spirit of justice, and where the serv-

ices are onerous, remuneration has sometimes been allowed. Courts may infer agreement as to remuneration from the nature of the employment and the relation of the parties. But this doctrine should be applied with caution, to the end that it be not subversive of the plain declaration of the law. An agent, having used his principal's funds in his own affairs, is answerable for interest on the same. *Beugnot vs. Tremoulet*, 52 La. An. 454 (27 Sou. 107).

A mandate to sell land is gratuitous unless there be a contrary agreement. Where real estate was placed in the hands of regular brokers for sale on commission, and they purchase the property from an agent of the owner with power of attorney to sell, such agent has no legal right to retain commissions out of the price received by him in the absence of a specific agreement to that effect. The burden of proof is on such agent to show that he had the legal right to retain his principal's money as commission; and, where the testimony is conflicting, the judgment appealed from not clearly or manifestly erroneous will not be disturbed. *Knopps vs. Midkiff*, 114 La. 234 (38 Sou. 153).

Where the terms of a mandate's commission are fixed by consent, the Court cannot inquire if the terms are wise or not. *Succession of Hénry*, 115 La. 883 (40 Sou. 253).

Refer to Art. 3015.

Art. 2992.

An agent's declaration of his authority, made in an act of mortgage executed by him in the name of his legal principal, proves nothing as to the existence of such authority. *Transportation Co., Ltd., vs. Pugh et al.*, 52 La. An. 1517 (27 Sou. 958).

Contracts or agreements above \$500 in value must be proved by at least one credible witness and other corroborative circumstances. (Art. 2277.) The same rule applies to mandates. (Art. 2992.) *Hannay vs. N. O. Cotton Exchange*, 112 La. 998 (36 Sou. 831). (See Art. 2277.)

Art. 2996.

Authority to make notes and to grant mortgages must be express and special, and is not conveyed by a general mandate authorizing an agent to take charge of, adjust, manage and control the interest of the heirs in the succession, although such agent may be called upon, in the proper

discharge of his functions, to manage a plantation which forms part of the inheritance of such heirs, and to obtain advances for that purpose. *Transportation Co. vs. Pugh et al.*, 52 La. An. 1517 (27 Sou. 958).

Refer to Art. 2997.

Art. 2997. See Art. 2996, 52 La. An. 1520.

A husband has no authority to mortgage the property of his wife in her name, without a special power to that effect, still less has he the right to do so in his own name to secure his individual note given for borrowed money. *Aiken vs. Robinson et al.*, 52 La. 925 (27 Sou. 354).

The authority of the parties who signed the appeal bond for the surety company is shown to the satisfaction of the Court. The company has not only questioned their authority, but has received a premium for becoming such surety. *Eichorn vs. N. O. & C. Ry. L. & P. Co.*, 114 La. 716 (38 Sou. 526).

Art. 3001.

Women can be agents, even without authority of their husbands. But they cannot stand in judgment without that authority, or that of the Court. *Granger vs. Sallier*, 110 La. 256 (34 Sou. 434).

Art. 3002.

Plaintiff having placed the property claimed by her in the name of one of the defendants, in order to enable him to sell it for her account, cannot recover against an innocent third person who bought the property from this defendant. *Harris vs. Harris*, 109 La. 913 (33 Sou. 918).

The Parish School Board appointed a local committee to supervise the erection of a school house, and said committee made a contract for bricks at a certain price, to be delivered to and accepted by the contractor if found suitable. The kiln was burned and a certain proportion of the bricks was accepted by resolution of the committee, carried by the casting vote of the defendant as chairman, and all the members signed a warrant for the price, and the proceeds of the warrant was received by the defendant as a creditor of the contractor for furnishing the bricks. On inspection by experts the bricks were found unsuitable for use. *Held*, that the defendant was properly condemned to make resti-

tution to the plaintiff board on the ground that an agent is responsible for damages resulting to his principal from the nonperformance of his duty, or from his fault or neglect. Arts. 3002 and 3003. *Parish Board of School Directors vs. Alexander*, 125 La. 808 (51 Sou. 906).

Refer to Art. 3003.

Art. 3003. See Art. 3002, 125 La. 812.

The parties employing the attorneys did not profess to act for parties other than themselves. Had they, in making the employment, done so professedly for parties other than themselves, either separately or jointly with themselves, it could be conceded that these attorneys would have a direct action against the latter if they stood by making no objection, and finally avail themselves of the benefits resulting from their labor. The absence of an actual authority originally to have so employed them would be replaced or cured by a ratification of that act, just as the action of an actual agent beyond the powers conferred upon him, where in affecting a loan for his principal he had granted a mortgage and the latter had received the money, or if it had been usefully employed for his benefit, the principal would be found to ratify the mortgage and might have been compelled to execute it. *Succession of Kernen*, 105 La. 603 (30 Sou. 239).

Art. 3005.

It does not follow that, because an agent admits receiving one rebate, he is to be charged with another, which he denies having received, and to which no one testifies; or that because an amount that he swears was obtained as a loan should not, on account of his relations to the lender and to others, have been borrowed, it should have been held to have been obtained as a rebate, and not as a loan. *Clement vs. South Atlantic S. S. Line*, 128 La. 399 (54 Sou. 920).

Art. 3007.

A bank receiving a check for collection is liable, under the Commercial Law, to the depositor for any loss occasioned by the conduct of any sub-agent employed by it to assist in making the collection; but in such a case there is no privity of contract between the depositor and the sub-agent.

Martin vs. Hibernia Bank & Trust Co., 127 La. 301 (53 Sou. 572).

Refer to Art. 3008.

Art. 3008. See Art. 3007, 127 La. 307.

Art. 3009.

Where the receiving bank gave the depositor for the amount of a check, and after indorsing the same in blank, forwarded the paper to another bank for collection and credit, which was forwarded to a second bank, after indorsing the check in blank, forwarded the same to its correspondent for credit, which was given, and the last bank forwarded the paper to the drawee bank for payment, but the check was not paid on account of insolvency of said bank, and the depositor sued the third bank for damages for negligence in not sending the paper to another bank for presentation: *Held*, that, in the absence of notice that the receiving bank was merely acting as a collecting agent, there was no privity between such bank and defendant, and, consequently, no sub-agency, either expressed or implied on which the action could be based. *Martin vs. Hibernia Bank & Trust Co.*, 127 La. 302 (53 Sou. 572).

Art. 3010.

An insurance company, like an individual, may limit the authority of its agents, and where direct notice of such limitation, or any notice, which a prudent man is bound to regard, is brought home to the assured, he is bound by it, and relies upon any act in excess of such limited authority at his peril. *Murphy vs. Royal Ins. Co. of Liverpool*, 52 La. An. 778 (27 Sou. 143).

Refer to Art. 3021.

Art. 3012. See Arts. 1934 and 3013, 129 La. 469.

Art. 3013.

Art. 3012 and 3013 construed together. *Held*, that the exhibition of an agent's authority to the person with whom he deals being a matter *dehors* the contract, the proof of such exhibition may be made by parol. *Tulane Educational Fund Adms. vs. Baccich & De Montluzin*, 129 La. 469 (56 Sou. 371).

Refer to Art. 3012.

Art. 3015. See Art. 2991, 52 La. An. 462; Art. 2164, 111 La. 17.

An owner of an undivided interest in real estate, who insures the property in his own name and for his own account, and not on behalf of the infant co-owner, is not entitled to the sum paid for the insurance on the distribution of the proceeds of the property on a sale for partition. Where one having an undivided interest in real estate had in his hands funds belonging to the co-owners, he must, when paying taxes on the property apply the funds *protanto* to the payment of the co-owner's taxes, and he could not hold claims against the co-owners as interest-bearing claims, based on his payment of taxes, while he had funds of the co-owners, which it could impute to their payment. *Inter-state Land Co. vs. Doyle*, 126 La. 707 (52 Sou. 991).

Art. 3016. See Arts. 1802 and 2040, 118 La. 946.**Art. 3021. See Art. 3010, 52 La. An. 788.****Art. 3027. See Arts. 1802 and 2040, 118 La. 947.****Art. 3028. See Art. 2749, 129 La. 524.**

Defendant made a contract with plaintiff to manage defendant's affairs, and accompanied the contract with a power to act as agent with full power to manage her affairs in Louisiana and Mississippi. This contract did not constitute the plaintiff a servant, overseer, or ordinary manager of the defendant, but her agent, and when her confidence had been shaken in him, she had the right to revoke his power of attorney. The contract was inseparably connected with the deed conferring the agency, and, taken together, does not give rise to an intent to allow plaintiff to recover for unearned salary, if the agency were terminated by the defendant.

The death of the defendant put an end to the agency, and precluded a recovery by the plaintiff for unearned salary. *Holmes vs. Murdock*, 125 La. 916 (51 Sou. 1035).

Art. 3031.

Without renouncing the agency or notice of intention not to complete the transaction by selling to a third person, this defendant, in buying, was in the attitude not sanctioned by the law of agency. It interposes a preventive check

against all such acts. Plaintiff, having placed the property in defendant's name, cannot recover against innocent third persons. She can recover against defendant, as he cannot be heard to claim the property under the circumstances. She, however, must take the property *cum onere*. *Harris vs. Harris*, 109 La. 924 (33 Sou. 918).

Art. 3035. See Art. 1890, 52 La. An. 410.

Art. 3037. See Art. 1890, 52 La. An. 410; see *Fontalieu vs. Fonitelieu*, 116 La. 882.

Art. 3039. See Art. 1890, 52 La. An. 410.

Art. 3042.

This article was amended by Act 225 of 1908, p. 342, by replacing the following for the first paragraph: The debtor obliged to furnish security must offer either a surety company authorized to do business in the State of Louisiana or a person able to contract who has property liable to seizure within the State of sufficient value to answer for the amount of the obligation, and who is domiciled in the parish where the security is to be given.

We know of no provision in the Constitution which prevents the Legislature if it sees fit with reference to sureties, or which requires the Legislature to exact any surety at all in the case of an appeal, and, as a matter of fact, Art. 3042 until amended by Act 76 of 1876 did not require that the surety should have property within the State. *Moffet vs. Koch*, 106 La. 374 (31 Sou. 40).

The specific grounds of this motion were that under the legislative Act No. 71, page 83, of 1894, no foreign surety is allowed to do business in this State until it has deposited with the State Treasurer cash or security to the amount of \$50,000. This statute should be read with the article of the Civil Code regarding sureties, and, judged by this article, it is evident that this no longer existing company in this State as a corporation with power to sign bonds is not the required surety. *Ansley vs. Stuart*, 121 La. 631 (46 Sou. 675).

Under Art. 3042, as amended, and Art. 3065, an attorney may become a surety on client's bail bond, notwithstanding a rule of court declaring that attorneys shall not be accepted as sureties on the bail bond of their clients. Acts 1880, page 18, No. 11, making it unlawful for judicial or

ministerial officers to go bail refer to Sheriffs, etc., and does not prohibit an attorney from becoming a surety on his client's bond. *State vs. Babin*, 124 La. 1005 (50 Sou. 825).

Refer to Art. 3064.

Art. 3043.

Where the surety upon an administrator's bond is not insolvent, but simply insufficient, she should not be released and a new bond given. The administrator should be made to make the suretyship sufficient, and the Court should decree to what extent the existing suretyship is insufficient in testing the solvency of a surety, incorporeal rights owned by her are to be considered, if within the State, and liable to seizure. *Succession of Weeks vs. Administrator*, 104 La. 573 (29 Sou. 219).

Art. 3045.

Where a person binds himself *in solido* with the lessee for the obligations of a written lease, waives discussion and division, and when sued thereon, judicially admits that he became a party to such lease and to the rent notes given in accordance with its provisions, and there is nothing to show that he contracted in any other capacity than as appears, the defense that, as surety, he is discharged by reason of the prolongation of the terms of payment granted by the lessor to the lessee cannot be sustained. *Moriarity vs. Bag-netto*, 110 La. 598 (34 Sou. 701).

Art. 3048.

Under Art. 3269 funeral charges are privileged on the proceeds of immovables when movables are insufficient. Where the movables were sufficient, but the creditor for funeral expenses has lost his recourse against the same by his remissness in instituting proper legal proceedings, he cannot recoup the loss out of the proceeds of the immovables specially mortgaged to another creditor of the decedent. *Bau-man vs. Armbruster*, 129 La. 191 (55 Sou. 760).

Refer to Arts. 3252, 3269.

Art. 3049. See Art. 1815, 118 La. 227.

Though a debtor, who is liable *in solido* with another, because both have become sureties for the same debt, may plead the benefit of division, such is not the case with the debtors of an obligation contracted *in solido*, who have no

such rights. *Edward Bruce Co. vs. Lambour*, 123 La. 970 (49 Sou. 659).

Art. 3050. See Art. 1815, 118 La. 227.

Art. 3051. See Art. 2772, 105 La. 337.

Art. 3052.

The Rhea mortgage was an indivisible mortgage covering in its entirety all the property mortgaged to secure it, although the debt secured was the joint debt of Mrs. Randolph and Mrs. Stark, there could be no question, that if Mrs. Randolph had been forced, in order to save her own property, to pay herself directly the indebtedness due to Mrs. Stark, that she would have had recourse back on the latter for all amounts paid for her benefit to the mortgage creditor with subrogation to the rights of that mortgage creditor (C. C. 3052, 3053, 3054). *Randolph vs. Stark*, 52 La. An. 1128. (26 Sou. 59).

Refer to Arts. 3053, 3054.

Art. 3053. See Art. 3052, 51 La. An. 1128.

Art. 3054. See Art. 3052, 51 La. An. 1128.

Where A acknowledged his indebtedness to B & C for \$12,000, for \$3,000 in cash, and their endorsement of notes executed by A in favor of B., and in evidence of said indebtedness executed and delivered to B & C his note for \$12,000, due one year after date, payable to his own order, and by him endorsed in blank, and specially mortgaged certain real estate; and where it was expressly stipulated that, on non-payment of said note at maturity B and C, or any future holder have right to foreclose; held, that B, on producing said note and a certified copy of the act of mortgage, was entitled to a decree of foreclosure without proving that the endorsers had paid the notes in favor of D, his right to sue having been expressly conferred by contract on the endorsers or holder of said note. *Iberia Cypress Co. vs. Christen*, 112 La. 448 (36 Sou. 490).

Art. 3060.

Where a lessee, holding under an unexpired lease, is adjudicated a bankrupt at a time when he owes no rent, such adjudication does not terminate the lease. The claim for rent

subsequently accruing is contingent, is not provable against the estate of the bankrupt, is not barred by his discharge, and the endorser of the notes given for such rent is still liable thereon. *Barnhardt vs. Curtis*, 109 La. 171 (33 Sou. 125).

Art. 3061. See Art. 2161, 51 La. An. 745.

Art. 3064. See Art. 3042, 124 La. 1006.

Art. 3066.

The suit against sureties on an administrator's bond will not be defeated because the creditors have not notified their judgment against him to the administrator, or called on him for a statement of the succession funds in his hands, there having been a final account filed by the administrator and homologated, showing the succession fund in his hands and fixing the amounts due the heirs. *Hayes et al. vs. Dugas*, 51 La. An. 448 (25 Sou. 121).

A surety upon an administrator's bond, cannot, by an *ex parte* judgment or a judgment rendered contradictorily with the administrator alone, obtain a discharge with respect to a breach of the obligation of the bond which has occurred before the obtention of such judgment. *Wiemann vs. Mainegra*, 112 La. 305 (36 Sou. 358).

Art. 3069.

Where there are minors interested, their consent, with that of the major heirs, is insufficient to authorize the administrator to carry on a commercial business belonging to the succession, and the minors are not estopped to hold him and his sureties liable for the consequences. *Wiemann vs. Mainegra*, 112 La. 305 (36 Sou. 358).

Refer to Art. 3070.

Art. 3070. See Art. 3069, 112 La. 311.

Art. 3071. See Art. 340, 118 La. 1004.

The timely institution of a suit by certain taxpayers, which is compromised and discontinued, cannot have the effect of suspending the prescription or pre-emption of the statute in favor of other taxpayers who did not sue at the time but afterwards. *Guillory et al. vs. Railway Co.*, 104 La. 11 (28 Sou. 899).

The right and authority to determine how to establish a system of sewerage in New Orleans, with whom to contract, what property to acquire, and how best to expend the money, are matters confided to the Sewerage Board and Council. It appearing that those bodies have acted within the scope of authority conferred upon them, honestly, carefully and in good faith, those for whom they have acted are bound, as a single individual would be. If there is any law in the State under which a contract so made can be annulled, for no other reason than because the price paid is thought to be excessive, our attention has not been called to it. The contract in question is in the nature of a compromise, and therefore falls under the ruling of Arts. 3071 and 3078. *Taxpayers vs. Sewerage Co.*, 108 La. 585 (32 Sou. 563).

It is not necessary to notice that part of the answer relating to what the company did in the way of paying the burial expenses of the deceased, further than to say that it in no way meets the requirements of Art. 3071. *Kimbell vs. Homer Mfg. Co.*, 109 La. 965 (34 Sou. 39).

Where a party who had suffered personal injuries while in the service of another, seeks that other and asks for and receives money from him, and signs a receipt acknowledging payment in full for time lost and medical bill, disclaiming liability for any other account, such as that which might be predicated on fault or negligence, he cannot afterwards, in the absence of proof of error or fraud sue for the recovery of damages. *Kelley vs. Homer Compress Co.*, 110 La. 983 (35 Sou. 256).

There is no rule of law, morals, or ethics, which denies to the ordinary citizen the right to compromise, if the person asserting it, a claim against him for damages; nor is that right defeated by any previous employment of counsel to prosecute such claim; and, when the compromise is effected, it has the force of the thing adjudged, and cannot be attacked collaterally, or for error of law or lesion, in a direct action. Where, however, the collateral attack has been made and met, no good purpose would be served by relegateing the parties to further litigation, the questions of validity will be decided on their merits. *Russ vs. Union Oil Co.*, 113 La. 196 (36 Sou. 937).

The claims of all interested creditors and owners of property about to be sold in foreclosure proceedings had been litigated, and judgment rendered. At last moment

oppositions to the sales were about to be filed. The parties agreed upon a compromise. It was consummated. The plaintiff in foreclosure, being the transferee of all the mortgage claims thereon, exercising his rights as a bidder on the property became the adjudicatee and owner. Having effected his purpose of becoming the owner, having proposed to parties interested to become the owner of their claims, and they, in consequence, having abandoned all claims, the adjudicatee and owner is without right to reclaim what he has paid. He is estopped by conduct and by the effect of subsequent judicial proceedings. *Pharr vs. Coudroy*, 118 La. 499 (43 Sou. 76).

This is all that relator asks in his motion. The decisions are clear and to the point that the agreement of transaction or compromise of a pending suit operates as a discontinuance of the action. *Saint vs. Martel*, 123 La. 819 (49 Sou. 582).

Refer to Arts. 3072, 3073, 3078, 3080.

Art. 3072. See Art. 347, 109 La. 365; Art. 3071, 118 La. 1001.

Art. 3073. See Art. 3071, 118 La. 505.

Art. 3078. See Art. 3071, 113 La. 205, 118 La. 1005, and 123 La. 819.

Art. 3080. See Art. 3071, 113 La. 205.

Art. 3084.

The expiration of the period for which a respite has been granted, authorizes parties whose right of action has been stayed by the respite, and whose claims have not been paid, to proceed separately in their individual behalf against their debtor. There is no obligation or duty on their part to force him to a *cessio bonorum*. *Kelley-Goodfellow Shoe Co. vs. Fluker et al.*, 51 La. An. 193 (25 Sou. 131).

Refer to Arts. 3085, 3096.

Art. 3085. See Art. 3084, 51 La. An. 193.

Art. 3095.

The statutory pledge created by Art. No. 66 of 1874, in favor of merchants and factors on shipment consigned to

them, with the right of sale, and the appropriation of the proceeds of sale to the amount due such consignees, is not affected by a respite granted to the consignor by a majority vote of his creditors. A consignor, who has by contract, vested in the consignees the right to impute credits as they saw fit, has no standing to complain of a general imputation of credits to his indebtedness as a whole. A respite operates no change in contracts, except as to the time of payment. *Ott vs. His Creditors*, 127 La. 827 (54 Sou. 44).

Refer to Art. 3186.

Art. 3096. See Art. 3084, 51 La. An. 196.

Art. 3098. See Art. 2170, 122 La. 600.

Art. 3100. See Art. 3101, 104 La. 425.

Art. 3101.

An attorney at law as such has no authority to submit the issues involved in a lawsuit to arbitrators, nor has an attorney in fact such authority unless specially authorized to that effect, nor can he waive any requirement of the law in regard to arbitrators without special authority. *King vs. King*, 104 La. 420 (29 Sou. 205).

Refer to Arts. 3100, 3106, 3111, 3130.

Art. 3106. See Art. 3101, 104 La. 425.

Art. 3111. See Art. 3101, 104 La. 425.

Art. 3130. See Art. 3101, 104 La. 425.

Art. 3133.

This case is of the class of pledge proposed, but not perfected, and nothing is better settled than that an inchoate or executory contract of pledge, not perfected by delivery, confers no rights as against other creditors. The death of the debtor fixes the rights of the creditors as they exist at that moment. The same rule is enforced when the debtor makes a surrender of his property to his creditors. No delivery had been made when that death occurred, none after was possible. (Arts. 3133, 3152, 3162, 3182, 3183, 3185.) *Succession of Gragard, Adm., vs. Bank*, 106 La. 303 (30 Sou. 885).

The title acquired by an adjudicatee at a tax sale is an inchoate one during the year for redemption, and is defeated by the exercise of that right; the mortgage existing on the property at the time of the adjudication remains in force during the same period. It is not the essence of a mortgage that the mortgagor should remain in possession of the property mortgaged, and it differs from the antichresis and pledge. *Moore vs. Boagni*, 111 La. 491 (35 Sou. 716).

An instrument purporting to sell certain movables on a plantation for a certain price acknowledged to have been paid in cash, cannot be construed, as against third person, as a contract of pledge securing the contingent liability of a surety on a release bond. *Millot vs. Comrad*, 114 La. 193 (38 Sou. 139).

Refer to Arts. 3135, 3158, 3167, 3179, 3183, 3185.

Art. 3135. See Art. 3133, 111 La. 500.

Art. 3136.

The transfer by indorsement of a bill of lading to shipper's order vests the title to the goods in the transferee as purchaser or pledgee, as the case may be. A bill of lading is a "negotiable instrument" by virtue of Act 150, page 193, of 1868, and as such may be transferred for an antecedent or a pre-existing debt, or for any consideration sufficient to support a simple contract. (Act 64, page 152, of 1904, paragraph 24.) A bill of lading, like any other negotiable credit, may be pledged by an indorsement and delivery to secure any lawful obligation. (Arts. 3136 and 3158.) *Scheuermann vs. Monarch Fruit Co.*, 123 La. 55 (48 Sou. 647).

Refer to Art. 3158.

Art. 3140.

The Code expressly authorizes the giving of a pledge for holding a surety harmless. It also dispenses with all formalities in the pledging of negotiable notes, except delivery to the pledgee. Hence, for pledging the note of a third person, to the maker's order, and by himself indorsed in blank, the indorsement of the pledgor is not required.

Where the pledged note was without consideration, and is saved from nullity in the hands of pledgee only because taken by him in good faith before maturity, the judgment against the maker will not be absolute, but will be so framed

as to be executory only in so far as may be necessary for carrying out the purposes of the pledge. *Fidelity & Deposit Co. vs. Johnston*, 117 La. 881 (42 Sou. 357).

Refer to Arts. 3157, 3158.

Art. 3152.

Pledge is grounded on possession, and the creditor, in order to have a pledge must remain in possession, and the property pledged must pass from the hands of the owner to those of the pledgee, and there must also be a complete separation of the property pledged from the other property of the pledgor. Possession is of the essence of the pledge, and a mere agreement by the pledgor to let the pledgee have possession of the property pledged, without such actual possession will not constitute a pledge as against third parties. *In re Pleasant Hill Lbr. Co.*, 126 La. 744 (52 Sou. 240).

Art. 3156.

The act of transfer and power of attorney, delivered with stock certificates, which are pledged to secure the payment of a note, are to be construed with reference to the entire transaction, including the recitals on the face and back of the note, and so construed, are the ordinary incidents of the contract of pledge, and do not evidence a present sale of the stock. *Citizens Bank vs. Folsom*, 123 La. 918 (49 Sou. 641).

Art. 3157. See Art. 3140, 117 La. 889.

Art. 3158. See Art. 3133, 114 La. 195; Art. 3140, 117 La. 899; Art. 3136, 123 La. 56.

This article was amended by Act 157 of 1900, p. 239, to read as follows: But this privilege shall take place against third persons only in case the pledge is proved by some written instrument, in which shall be stated the amount of the debt intended to be secured thereby, and the species and nature of the thing given in pledge; or the description of the thing pledged may be contained in a list or statement annexed to the instrument of pledge and giving its number, weight or descriptive marks.

When a debtor wishes to pledge promissory notes, bills of exchange, bills of lading, stocks, bonds, or written

obligations of any kind, he shall deliver to the creditor of the notes, bills of exchange, bills of lading, stocks, bonds, or other written obligations, so pledged, and such pledge so made shall, without further formalities, be valid as well against third persons as against the pledgor thereof, if made in good faith; provided, that, where the pledge is of instruments not negotiable, the debtor must be notified thereof. All pledges may be made by private writing of any kind if only the intention to pledge be shown in writing; but all pledges must be accompanied by actual delivery. The delivery of property on deposit in a warehouse, cotton press, or on storage with a third person, or represented by a bill of lading, shall pass to the pledgee by the mere delivery of the warehouse receipt, cotton press receipt, bill of lading, or storage receipt, showing the number, quantity or weight of the things pledged; and such pledge so made, without further formalities, shall be valid as well against third persons as against the pledgor thereof, if made in good faith. Such receipts shall be valid and binding in the order of time in which they are issued for the number, quantity or weight of the things pledged, if there should not be enough to meet all receipts so issued.

There is nothing in Art. 3158 as amended upon which to rest the proposition that, in order to affect the maker of a mortgage note, and identify him with the pledge of the note to a third person, so as to put off equities, which may have existed between him and the original mortgagee, it is necessary that he be notified of the pledge. *Davis vs. Welch*, 128 La. 786 (55 Sou. 372).

Under Act of 1900 to constitute a pledge of a non-negotiable instrument, delivery by the owner to the pledgee, and notice in writing to the debtor of the credit, are essential formalities. Delivery to a bank for collection is not delivery to any of its officers individually. *Commercial Bank vs. Shanks*, 129 La. 861 (56 Sou. 1028).

Refer to Art. 3160.

Art. 3159.

This article was amended by Act 157 of 1900, p. 240, to read as follows: *Acts of pledge in favor of any bank in this State, whether State banks or National banks, shall be considered as forming authentic proof, if they*

have been passed before the cashiers of those banks, and contain such description of the objects given in pledge as is required by the preceding article.

But even if said note, because of non-conformity with the charter, were invalid, a pledge executed along with it to secure its payment would not lapse for want of a principle obligation, but would remain in full force and effect, as security for the return of the money received in the transaction.

A pledge of warehouse receipts need not be evidenced by any writing, but may be effected by mere delivery.

Act 72 of 1876, page 113, has no application to United States bonded warehouse receipts; hence, such receipts are not statutory instruments regulated by said act, but mere ordinary warehouse receipts, governed by commercial law, and, as a consequence, need not be paragraphed, for "hypothecation," in order to be susceptible of being given in pledge. *Blanc vs. Germania Nat. Bank*; 114 La. 739 (38 Sou. 537).

Art. 3160. See Art. 3158, 129 La. 864.

This article was amended by Act 157 of 1900, p. 240, to read as follows: When the thing given in pledge consists of a credit or instrument not negotiable, the pledge shall be complete, as to all the world, as soon as the debtor of such pledged credit or instrument shall have been notified in writing of the giving of such pledge.

Art. 3162.

The parties resorted to what is styled an escrow, which we understand was nothing more than a deposit in the hands of a third party, charged with the duty of delivering the notes and the certificates as the obligations of the different parties matured. Neither party could withdraw the instrument from the hands of the depository. There was not only a sale of the stock, but a pledge of the same to secure the payment of the price by delivering to a third person agreed upon between the parties. *State ex rel. Bulkley et al. vs. Whited & Wheeless*, 104 La. 133 (28 Sou. 922).

Where money is borrowed upon a promise to furnish as collateral security bills of lading for property then in the hands of a carrier, and unpaid for, and the borrower pays for the property and retains the bills in his possession with

the consent of the lender, until the property itself, still in the hands of the carrier, is seized at the suit of his creditor, the lender has no pledge, and the subsequent delivery of the bills to him does not affect the seizure. *Cameron et al. vs. Railway Co.*, 108 La. 84 (32 Sou. 208).

Art. 3164.

The appointment of a receiver does not divest the possession of the pledgee, and the property pledged cannot be sold in the receivership for less than the secured debts, with interest and costs, without the consent of the pledgee; and where, under the contract of pledge, certain prices were to be paid for lumber delivered, the pledgee will not be permitted to purchase such lumber at lower prices from the receiver, without the consent of the pledgor. *Ozan Lbr. Co. vs. Goldonna Lbr. Co.*, 124 La. 1026 (50 Sou. 839).

Refer to Art. 3165.

Art. 3165. See Art. 2053, 120 La. 656; Art. 3164, 124 La. 1031.

Art. 3166.

Where property exempted from seizure under Art. 644, Code of Practice, and the statutes amendatory thereto, has been pledged, it may be seized in foreclosure of the pledge. *Kyle vs. Sigur*, 121 La. 888 (46 Sou. 910).

Refer to Arts. 3279, 3280, 3282.

Art. 3167. See Art. 3133, 111 La. 500.

Art. 3170.

Being an action for the recovery of moneys had and realized by the pledgees for and on account of the note pledged, over and above the sum needed to satisfy their claim against the pledgor, the prescription which operates a release from debts of ten years only applies. *Hennessey, Liquidator, vs. Stempel, Guardian, etc.*, 52 La. An. 450 (26 Sou. 1004).

The interest of a defendant in the Julia Street property was transferred to F. G. E. and F. E., charged with the obligation assumed by them of paying the plaintiff, and of carrying out the obligation contracted by the mortgagors in the act before C of taking out fire policies on the property secured by the mortgage. This obligation they carried out,

and the defendant had a right to suppose that the plaintiff would respect her rights. Had they not taken out the policies the defendant would have been entitled to have done so herself; to have held the policies not only for the plaintiff for her own protection in premises. When F. G. E. & F. E. obtained and gave them as collateral to plaintiff, it was his duty to hold them for defendant's protection as well as his own. The diversion of the collaterals carried with it as its result the obligation of the plaintiff to credit the debt to the amount diverted. *Burbank vs. Buhler*, 108 La. 50 (32 Sou. 201).

The C. C. treats the rights of the pledgee in the property pledged as being in the nature of ownership to the amount of the pledge. It may have to yield to superior claims against it; the right none the less is very similar to the rights of an owner. (Arts. 3157, 3170, 3171.) *Fidelity & Deposit Co. vs. Johnston*, 117 La. 889. 42 Sou. 357).

A transaction whereby a bank holding a demand note payable to it at its place of business, and secured by a pledge, indorses the note "without recourse" and delivers it, with the pledged securities, to a third person for a consideration more than sufficient to pay the note, is upon its face a sale of the note, and a substitution of the purchaser in the place of the bank as the pledgee of the securities. *Smith vs. Shippers' Oil Co.*, 120 La. 642 (45 Sou. 533).

Refer to Arts. 3171, 3172, 3509, 3510, 3544, 3551, 3552.

Art. 3171. See Art. 3170, 117 La. 889.

Art. 3172. See Art. 3170, 52 La. An. 452.

Art. 3173. See *Kyle vs. Sigur*, 121 La. 890.

Art. 3175. See Art. 1908, 122 La. 154.

Art. 3178. See Art. 1268, 108 La. 73.

Art. 3179. See Art. 3133, 111 La. 500.

Art. 3182. See Arts. 1994 and 1860, 114 La. 642,

Art. 3183. See Art. 3133, 106 La. 300; Art. 2315.

The facts of the case lead to the conclusion that the purchase was not a real transaction; that it was in accordance with an understanding to protect the title and thwart plaintiff in his attempt to recover his judgment.

The property was returned to the wife of the vendor, who is not shown to have personal right, or to have paid the price. *Gothye vs. Delatour*, 111 La. 766 (35 Sou. 896).

Art. 3185. See Art. 3133, 106 La. 303.

The act of pledge and pawn, having been properly recorded in the Parish of I., is recognized on the crop made in that parish.

The act of pledge and pawn not having been properly recorded in the Parish of West Baton Rouge, it does not secure the pledge and pawn; it secures a privilege, however. *Henry Lochte Co. vs. La Febre*, 124 La. 244 (50 Sou. 26).

Refer to Arts. 3186, 3217.

Art. 3186. See Art. 3185, 124 La. 250; Art. 3095, 127 La. 830.

Art. 3214.

A stockholder of a corporation, who is likewise vice president, without salary, is not precluded by the fact of being a stockholder and officer from being employed as a salesman for the corporation at a reasonable salary, and if he performs his duties as such he is entitled to his salary as such with the privilege of securing the same like any third person would do who would perform such service. *Frederichs vs. Frederichs, Young & Taney*, 126 La. 689 (52 Sou. 996).

Refer to Art. 3252.

Art. 3217. See Art. 3185, 124 La. 251.

After the expiration of the lease, the property remains on the premises, it is considered in his possession until the rental is paid. The tenant cannot, by a sale, take from the landlord the right which he has on the property. "The lessor, on the contrary, may take the effects himself and retain them until he is paid." *Villere et al. vs. Succession of Shaw*, 108 La. 72 (32 Sou. 196).

The seizure and sale of a plantation with a crop thereon standing by the roots, at the instance of a creditor holding a special mortgage antedating a debt due for supplies furnished to cultivate the crop, does not cut off the privilege upon the crop. The crop passes to the purchaser as a part of the realty without personal liability on his part to the furnisher of supplies, but he takes it *cum onere*.

He stands, *quoad* the privilege in the shoes of the original owner, as if the sale had not taken place. *Wyle & Co. in Liquidation, vs. Kent et al.*, 52 La. An. 2140 (28 Sou. 295).

A wholesale grocer and cotton factor furnishing supplies necessary to a plantation with the expectation that they will be paid for in cash or at a short time, is nevertheless entitled to the privilege accorded by Art. 3217.

By no agreement between the holders of privileges first and third in rank can the holder of privilege second in rank be subordinated to both the others. *Southern Grocery Co. vs. Adams*, 112 La. 60 (36 Sou. 226).

The crop privilege conferred by Art. 3217 is intended to secure the reimbursement only of money, which, having been advanced, is actually used, for the purchase of necessary supplies and the payment of necessary expenses for the farm or plantation, and it is for the person seeking to enforce the privilege to prove that the money claimed by him was so used by him; otherwise, no privilege can be recognized. *National Bank of Commerce vs. Sullivan*, 117 La. 163 (41 Sou. 480).

The actual use of money, advanced for the purchase of necessary supplies and the payment of necessary expenses in making a crop of cotton, may be arrived at by showing that the money was actually advanced, that the crop was actually made, and that no sufficient amount for the making was obtained from any other source. *National Bank of Commerce vs. Sullivan*, 119 La. 935 (44 Sou. 734).

Where an administrator cultivates a plantation without authority, he cannot bind the successor, but may render himself personally liable for the obligations thereby incurred. On the other hand, the person who furnishes the money and supplies used in the production of a particular crop is entitled to enforce his privilege on the crop, and the administrator, who has acted as such in obtaining the money and supplies, may stand in judgment in a proceeding instituted for that purpose, though no general judgment may be rendered against him as representing the succession. *Maxwell-Yerger vs. Rogan*, 125 La. 1 (51 Sou. 48).

The purpose of Act 27 of 1894, was to give a lien and privilege upon a portion of the product of the cane upon the same terms as other liens are given upon entire crops; that is to say, as security for the whole debt and to be enforced, to the extent to which it is given, until the whole debt is paid, and the vendor of cane has his lien and privilege for the price against the property, which is subject to it, so long as he can find any part of that property in the possession of the purchaser, and any part of the price remains unpaid. *Carrol, Henderson & Carrol vs. Swift & Co.*, 129 La. 43 (55 Sou. 703).

Refer to Arts. 3218, 3268.

Art. 3218. See Art. 3217, 108 La. 72; Art. 2705, 123 La. 323..

Art. 3227.

A steam engine, used in connection with a pump for irrigating, with a thresher for threshing, and possibly with plows and harrows for cultivating a crop of rice, and not shown to have been used for any other purpose than the cultivation and harvesting of such crop, is a farming utensil, upon which the privilege of the vendor primes that of the lessor of the land; and this, whether the engine be acquired as part of the pump or the thresher, etc., or at another time and from another source. *Lahn & Co. vs. Carr*, 120 La. 797 (45 Sou. 707).

Refer to Art. 3259.

Art. 3237.

A vendor's lien or privilege on a steamboat must be enforced within six months from the date of the sale, although a note payable at a distant day has been given for the credit portion of the purchase price. The privilege pre-empts or dies at the end of six months, and in such a case no plea of prescription is necessary. Where such note was received as cash, the debt was novated, and the vendor's lien is waived. *In re Red River Line*, 115 La. 868 (40 Sou. 250).

Art. 3249. See Art. 2772, 51 La. An. 1386; 105 La. 339, and 119 La. 47.

Art. 3252. See *Granger vs. Hebert*, 121 La. 1050; **Art. 2382**, 108 La. 542; **Art. 3214**, 126 La. 701; **Art. 3048**, 129 La. 193.

In case a single piece of real estate is the only asset of a succession, and it is burdened with a vendor's lien and mortgage, the administratrix will be entitled to charge the fees of her attorney, and pay same from the proceeds of sale, in case no executory proceedings have been commenced in the foreclosure of the mortgage of the vendor. *Succession of Negueloua*, 52 La. An. 1495 (27 Sou. 962).

Where a minor in necessitous circumstances, born of the wife of its putative and deceased father during the life of the latter, makes claim under Art. 3252, to a sum of money derived from the sale under an executory process of property belonging to his succession, which sum is less than that to which the appellate jurisdiction of this court extends, and the seizing creditor by way of defense to the claim so made, denies the paternity of the minor, the judgment of the District Court is appealable to this Court; and the appeal will not be dismissed on the ground that the amount is not sufficient to give jurisdiction. *Ezidore vs. Coureau's Heirs*, 113 La. 839 (37 Sou. 773).

The homestead claim of the widow and minor children left in necessitous circumstances is superior to the expenses of the last illness, and all the other general privileges set forth in Article 3254. *Succession of Campbell*, 115 La. 1035 (40 Sou. 449).

Art. 3252 grants the widow or children money and not land. In order that title to any land of the succession should vest in the widow or children, it would have to be transferred from the succession to them through some legal proceedings. The administrator of the father's succession is without power or authority to transfer land to the children by an allotment or a *dation en paiement* to them in lieu of money, and the mother cannot legally bind the minors to accept title to the land without their consent. *Warner vs. Hall & Legan Lbr. Co.*, 121 La. 81 (46 Sou. 108).

A widow with minor children receives from the succession of her husband a thousand dollars under Art. 3252. Being in possession of that money under those circumstances, she purchased individually certain real estate with part of the same; the seller of the property being aware of

the origin of the fund. The children, becoming of age, claimed that the property purchased by the mother belonged to them, and that therefore she could not sell it. *Held*, this contention is untenable. Conceding that the mother held the entire fund in usufruct, she had the legal right as such to make use of it for her own interest, subject to the right of the children to demand in money the amount due them at the termination of her usufruct. *Succession of Dielmann*, 119 La. 117; *Teddlie vs. Riser*, 121 La. 666 (46 Sou. 688).

One who has worked for a receivership as a bookkeeper and clerk is entitled to a privilege for the payment of the amount due him, according to Art. 3252. If the movable property not subject to any privilege is sufficient to pay him he should be paid therefrom, and, if not, then in the order mentioned in the Code. If this is not sufficient, then the balance must be raised on the immovables of the debtor. (Art. 3266.) *In re Pleasant Hill Lbr. Co.*, 126 La. 744 (52 Sou. 1010).

Refer to Arts. 3253, 3254, 3266, 3267, 3269, 3284.

Art. 3253. See Art. 3252, 52 La. An. 1499.

Art. 3254. See Art. 3252, 52 La. An. 1499, and 115 La. 1035.

Funds in the receiver's hands subject to no special privilege must be first applied in paying the claims which are entitled to rank as general privileges, priming the lessor's privilege, and only for the balance that may be left over after exhausting the fund, subject to no special privilege, can recourse be had against the fund, which is subject to the lessor's special privilege. *Printing Co. vs. Furniture Concern, Ltd.*, 108 La. 259 (32 Sou. 469).

Art. 3256.

The fee of attorney is allowed, to the extent strictly, that the services of the attorney were rendered in having the property sold. The amount allowed does not cover all the services rendered in the insolvency proceedings, not immediately connected with the sale of the property. Arts. 3256 and 3257 are analogous. *Salauv vs. Creditors*, 106 La. 216 (30 Sou. 767).

Refer to Arts. 3257, 3267.

Art. 3257. See Art. 3256, 106 La. 219.

3256, 3267

Art. 3259. See Art. 3227, 120 La. 799.

A steam thresher necessary for harvesting of a rice crop is within the meaning of the term "farming utensil," as used in Art. 3259; and, the vendor's privilege on the proceeds from the sale of such machinery is superior to the privilege of the lessor for rent. *Laporte vs. Libby*, 114 La. 570 (38 Sou. 457).

Refer to Art. 3263.

Art. 3263. See Art. 3259, 114 La. 572.**Art. 3266. See Art. 3252, 52 La. An. 1500, and 126 La. 744.****Art. 3267. See Art. 3256, 106 La. 219, and Art. 3252, 126 La. 758.****Art. 3268. See Art. 3217, 52 La. An. 2144.****Art. 3269. See Art. 3252, 52 La. An. 1500; Art. 3048, 129 La. 191; Ziegler vs. Creditors, 116 La. 253.**

The law provides that the claim of the widow or minor in necessitous circumstances "shall be paid in preference to all other debts, except those for the vendor's privilege, and those incurred in selling the property," but it does not otherwise affect the order of preference in which the creditors of a succession are to be paid, and, after such claim has been so paid, the claims to which inferior privileges are accorded should be paid in the order established by law, and should not be subjected to horizontal or *pro rata* contribution, levied without regard to rank. *Succession of Peters*, 114 La. 952 (38 Sou. 690).

Art. 3070. See Ziegler vs. His Creditors, 116 La. 258.**Art. 3272. See Art. 2772, 52 La. An. 1586, 105 La. 339, and 119 La. 41.**

Parties who contract to take stock in a corporation for and in consideration for personal services to be rendered by them, who render such services and become entitled to the stock, do not become creditors of the corporation by reason of the fact that the company is placed in the hands of a receiver before the stock is in fact issued. *Villere vs. N. O. Pure Milk Co.*, 122 La. 718 (48 Sou. 162).

Refer to Art. 3274.

Art. 3273. See Art. 2772, 51 La. An. 1387, 52 La. An. 1586, and 119 La. 47.

Art. 3274. See Art. 2772, 51 La. An. 1387, and Art. 3272, 122 La. 736.

The law does not contemplate that a privilege shall become extinct by the sale of the thing on which it bears. Its adhesion to the thing under such circumstances is of its very nature and essence, and unless it so adheres it is no privilege at all. *National Bank of Commerce vs. Sullivan*, 117 La. 181 (41 Sou. 480).

Notice of a claim, the privilege to secure which may be preserved by registry, is not the equivalent of registry. *Shreveport National Bank vs. Maples*, 119 La. 41 (43 Sou. 905).

The delay of seven or fifteen days commences to run from the date of the contract, whether written or verbal, and in the latter case it suffices to record an affidavit setting forth the terms of the agreement. *Allen Wadley Lbr. Co. vs. Huddleston*, 123 La. 522 (49 Sou. 160).

Refer to Art. 3277.

Art. 3276.

Art. 186 of the Constitution of 1898 simply repeats the provisions of Art. 3276, and adds to the list privileges for "expenses of the last illness," and privileges for "taxes." In other words, Art. 186 of the Constitution places such privileges on the same plane as claims originating after the death of the *de cuius*, which the Civil Code has never required to be recorded, since registry is without effect after decease. *Succession of Elliot*, 31 La. An. 37; *Bauman vs. Armbruster* (129 La. 193 (55 Sou. 760).

Art. 3277. See Art. 3274, 117 La. 181.

Art. 3279. See Art. 3166, 121 La. 890.

Art. 3280. See Art. 3166, 121 La. 890.

Art. 3282. See Art. 2161, 116 La. 816; Art. 3166, 121 La. 890; Art. 2112, 129 La. 15.

One must proceed upon the mortgage for the recovery of the whole amount due, and that where a mortgage rests

upon the property, to a portion of which the mortgagor has no title, the mortgagee can force it for the full amount, against that portion to which the mortgagor has title. But it does not follow that the mortgagee is obliged to cause all the property mortgaged to be sold when it is unnecessary for the satisfaction of his mortgage, or that the Article 650 of the Code of Practice which confers some rights upon the mortgagor is thereby abrogated or repealed. *Blanchard vs. Naquin*, 116 La. 816 (41 Sou. 99).

Art. 3284. See Art. 3252, 52 La. An. 1500.

Art. 3285.

Where there was no existing mortgage at the time an order of seizure and sale was issued, a sale thereunder is radically null and not curable by a prescription of five years. The title of a third possessor, a stranger to the proceedings, cannot be divested by a sale under executory process issued on a mortgage note, which has been previously paid. *Ponds vs. Y. & M. V. Ry. Co.*, 122 La. 157 (47 Sou. 449).

Refer to Arts. 3330, 3411, 3543.

Art. 3286. See S. D. Moody vs. Sewerage & Water Board, 117 La. 368.

Art. 3289. See Art. 468, 113 La. 917; Art. 468, 125 La. 848; *Bauman vs. Armbruster*, 129 La. 198.

Art. 3291. See *Villere vs. N. O. Pure Milk Co.*, 122 La. 735.

Art. 3293. See *Villere vs. N. O. Pure Milk Co.*, 122 La. 735.

Holders of notes, secured by mortgage, transferred in good faith, are entitled to hold them between themselves and the transferors. Third persons had not acquired an adverse right prior to the transfer.

As relates to the second series of notes, the condition being different, the right of the mortgage creditors, second in rank, is recognized as priming the mortgage first in rank

to the extent that it was without consideration at the date that the mortgage creditors second in rank acquired their right. *Walmsley vs. Resweber*, 105 La. 522 (30 Sou. 5).

Art. 3295. See Art. 2013, 51 La. An. 1127.

Art. 3296. See Art. 2013, 51 La. An. 1127.

Art 3303.

The fact that money borrowed by a husband in his individual name, and for which he gave his individual note securing the same by a mortgage on his wife's property, was employed by him in paying notes of his wife secured by a mortgage on her property, created no liability by the wife, either personally or through her property to the lender. Her resulting liability was to her husband. (Art. 2997.) *Aiken vs. Robinson et al.*, 52 La. An. 925 (27 Sou. 529).

A partner is bound by his acts as mortgagee to the extent of his interest, and by his declarations of indebtedness as mortgagor. A partner who is not the special agent of the partnership has no authority to execute a mortgage against his co-partners. The co-partners are not bound as having ratified their co-partner's act in having mortgaged their property, as it is not shown that they were made aware of the fact that he had mortgaged their property. *Kahn vs. Becnel & Co. et al.*, 108 La. 296 (32 Sou. 444).

Art. 3304.

Where a co-owner mortgaged his interest in four tracts of land and by a partition was given an interest in one tract, the mortgage did not become valid for, while Art. 3308 prohibits mortgaging future property, Art. 3304 provides that, if a person grants a mortgage on property of which he is not then the owner, it shall be valid if he shall ever acquire ownership of the title, thus showing the first mentioned article merely applies to future indefinite property. *Anglin vs. Kilbourne*, 131 La. —— (59 Sou. 116).

Refer to Art. 3308.

Art. 3305.

One who accepts a mortgage, though merely *pro forma*, becomes a party to the act, and is bound by recitals affecting his interest; and a plaintiff, suing for the enforcement of

such mortgage, need not set up the estoppel in his petition, since one is not bound to allege matter the materiality of which depends upon the possible plea of his opponent.

If there were verbal stipulations, they cannot be of any effect, for they were not made in compliance with the articles of the Code requiring written evidence of a mortgage. *Walmsley vs. Resweber*, 105 La. 533 (30 Sou. 5).

As relates to the mortgage; although not in authentic form, it still exists, for a mortgage act may be passed by private signature. *Sleekman vs. Schwartz*, 128 La. 11 (54 Sou. 405).

Refer to Arts. 3342, 3343, 3344.

Art. 3306.

If the property is described by name and boundaries, both should be given sufficient accuracy to designate the person named and the boundary of the property. If described by sections and quarter sections, the numbers should be correctly given. A third person cannot be held to know that Section 27 or a part of it has been sold when the number of another section is given, there being nothing in the deed to show that the first was the number intended. *Sentell vs. Randolph et al.*, 52 La. An. 52 (26 Sou. 797):

Art. 3308. See Art. 3304, 131 La. — (59 Sou. 116).

Art. 3314. See Art. 322, 51 La. An. 139.

Art. 3321.

The Court of the domicile of the marriage may at the suit of the wife, render a decree of divorce against the non-resident husband on constructive service, as provided by statute, but such court is without jurisdiction to render alimony or for costs against the non-resident husband, not served with process, and not appearing in the cause. The judicial mortgage cannot be enforced in cases *in personam* where there is substituted service. (U. S. Constitution: Taking property without due process of law.) *Baker vs. Jewell*, 114 La. 727 (38 Sou. 532).

Art. 3322. See Art. 2246, 107 La. 492.

This article was amended by Act 78 of 1900, p. 128, to read as follows: The judicial mortgage takes effect

from the day on which the judgment is recorded in the manner hereafter directed.

Art. 3328. See *Baker vs. Atkins & Wiedeman*, 107 La. 492.

An attachment having been obtained on the sole ground that the defendant had caused a reputed act of mortgage in favor of his wife to be recorded against his property with intent to defraud his creditors, and an averment to that effect in the plaintiff's petition having been withdrawn on proof of its validity being offered, the same must, as a necessity, be dissolved. *Koenig vs. Huck*, 51 La. An. 1368 (26 Sou. 543).

A judicial mortgage will not attach to an immovable action as distinguished from the property, which is the subject of the action; nor to the interest of the debtor in the movables, slaves and immovables which compose the active mass of the succession falling to him as heir. *Voorhies vs. DeBlanc*, 12 La. An. 864, and *Douglass vs. Douglass et al.*, 51 La. An. 1471 (26 Sou. 546).

Art. 3330. See **Arts. 2428 and 3285, 122 La. 161; Art. 3328, 51 La. An. 1373.**

Where a *dation en paiement* is made by the husband to the wife to replace her paraphernal funds the legal title vests in the wife, and not a mere equity representing the value of the property, over and above the amount of prior mortgages and liens existing thereon. *Ponds vs. Y. & M. V. Ry. Co.*, 122 La. 157 (47 Sou. 449).

Art. 3342. See **Art. 3305, 52 La. An. 1522.**

Under Art. 3342, relating to the registry of mortgages so as to affect third persons, the record of a mortgage professing on its face to relate exclusively to a married woman's property, but so describing the same as to include the land of the husband joining therein, does not as against third persons operate as a mortgage on his land, and does not affect one subsequently accepting a mortgage on his land. *W. F. Taylor Co. vs. Sample*, 122 La. 1016 (48 Sou. 439).

Art. 3343. See **Art. 3305, 52 La. An. 1522.**

Art. 3344. See **Art. 3305, 52 La. An. 1522.**

Art. 3348. See Art. 507, 110 La. 239; *Swoop vs. St. Martin*, 110 La. 239.

Art. 3350. See Art. 251, 51 La. An. 971; *Miguez vs. Decambre*, 125 La. 195; Art. 3356, 125 La. 195.

Art. 3351. See Art. 251, 51 La. An. 971.

Art. 3355.

“Accordingly, said Therese Hoffman, widow by the first marriage of Henry Bergey, and now wife of Bertrand Labat, and said Labat are indebted to petitioners in the sum of \$2,900, with legal interest from April, 1894, until paid, and that these petitioners have a mortgage on all the property of said defendants to secure said amount pursuant to Art. 3355.” But, when the funds of the community are insufficient to pay the claims of both spouses, then the charges in favor of the wife must be taken out of it before those in favor of the husband can be paid. *Bergey vs. Labat*, 112 La. 992 (36 Sou. 829).

Art. 3356. See Art. 251, 51 La. An. 971.

The party entitled thereto does not necessarily lose the usufruct by failing to record the inventory, though no doubt that might be the case if it were shown that the owner was thereby prejudiced. *Miguez vs. Delcambre*, 125 La. 195 (51 Sou. 108).

Refer to Art. 3350.

Art. 3364.

The paraph of a notary is his official signature; and, where he parahs a forged note, he acts as a notary; and one deceived by this paraph has a cause of action against the surety.

While the paraph does not guarantee the value of the property or the rank of the mortgage, it does guarantee the genuineness of the note and of the mortgage. *Harz vs. Gowland et al.*, 126 La. 674 (52 Sou. 986).

Art. 3369. See Art. 1970, 114 La. 867.

Under Act 73 of 1876, providing that the cost of paving shall constitute a lien upon the abutting property until paid, a paving contractor was relieved from the necessity

of reinscribing his claim within ten years, in accordance with Art. 3369. *Barber Asphalt Paving Co. vs. King*, 130 La. —— (58 Sou. 572).

Art. 3370. See Art. 304, 109 La. 310.

Art. 3374.

In the case of solemn acts—that is, acts which, in order to be valid, must be drawn after the fulfillment of certain formalities—the notary is liable, also his bondsmen, if they are not drawn in legal form.

He and his bondsmen are also liable if he is called upon to comply with the law in Arts. 3374 and 3383, regarding the cancellation of mortgages, and he fails to carry out directions, and avails himself of the opportunity to commit a fraud upon the person by whom he is employed to see to the cancellation. *Stork vs. American Surety Co.*, 109 La. 713 (33 Sou. 742).

Refer to Art. 3378.

Art. 3381.

The evidence relating to the question of jurisdiction is all before the Court, and, after weighing and considering this evidence, the Court holds that it has jurisdiction to direct the Recorder of Mortgages to cancel and erase a judicial mortgage instituted after a suspensive appeal has been taken. After it has been perfected, the *status quo* remains until decision on appeal. *Dannenmann & Charlton vs. Charlton*, 113 La. 277 (36 Sou. 965).

Art. 3383. See Art. 3374, 109 La. 713.

Art. 3384. See Art. 3364, 126 La. 679.

It is, however, no part of the duty of a notary to solicit or receive money for investment; and money intrusted to him for that purpose is not received in the discharge of the duties, or by virtue, or by means, or under color, of his office, and the surety on his official bond is not liable therefor. *Nolan vs. Labatut*, 117 La. 431 (41 Sou. 713).

Art. 3409.

Whilst one cannot be, at the same time, owner and mortgagee of the same property, if the title, which, apparently conveying perfect ownership, is supposed to de-

stroy the mortgage by confusion, turns out to be no title, or an imperfect title, the mortgage, which was suspended and thus apparently destroyed, upon the assumption of the perfect ownership revives, the cause of its suspension and supposed destruction no longer existing. *Pugh vs. Sample*, 123 La. 791 (49 Sou. 526).

Art. 3411. See Art. 3285, 122 La. 159.

Art. 3426.

A right of homestead once existing its not conditioned upon continued and continuous residence upon the property. Though non-residence does not carry with it, *per se*, a forfeiture of the right, the fact may be evidence of an intention to abandon, which, when coupled with others, may establish it. Each case must be determined by its own special facts.

The decision in *Maxwell vs. Roach*, to the effect that a homestead right is not necessarily terminated by the dissolution of the community by the death of one of the spouses, is affirmed. *Lyons vs. Andre*, 106 La. 356 (31 Sou. 38).

The constructive possession of the true owner, resulting from the principle that the corporeal possession of a part of the land is possession of the whole, prevails over the similarly constructive possession of another person who holds by virtue of a title *a non domino*. So, where a railroad acquired a right of way through a plantation, and also certain portions of ground to be used for depot sites, and went into possession, but did not record its title, and the plantation as a whole was thereafter sold to a person acquiring in good faith, the possession of the railroad became restricted to the land in the railroad's actual possession and use, and ceased to be, according to the non-recorded title. *Moore Planting Co. vs. Morgan's L. & T. R. & S. S. Co.*, 126 La. 842 (53 Sou. 22).

Refer to Arts. 3433, 3442, 3490.

Art. 3427. See Art. 852, 52 La. An. 198.

Whatever possession he had sprang from recorded titles. The law recognizes possession as following the registry of title without any actual occupation of the premises bought. This is called civil or constructive possession, as contradistinguished from natural or corporeal possession.

(Arts. 3427, 3428, 3431.) *Ashley Co. vs. Bradford*, 109 La. 653 (33 Sou. 634).

Refer to Arts. 3428, 3431.

Art. 3428. See Art. 852, 52 La. An. 198; Art. 3427, 109 La. 654.

Under Art. 49 of the Code of Practice, a plaintiff cannot maintain a possessory action unless he should have had real and actual possession of the property at the instant the disturbance occurred; and mere civil or legal possession is not sufficient. There can be no real and actual possession unless there be, in the commencement at least, a corporeal detention and use of the thing according to its nature and destination. As timbered swamp lands may be actually possessed by the construction of roads or canals, or by deadening, felling or removing the trees, they are no exception to the general rule. A mere payment of taxes, tracing of boundary lines, marking of trees and watching for trespassers do not constitute real and actual possession. Natural possession, in its nature, must be visible, open and public. *Albert Hanson Lbr. Co. vs. Baldwin Lbr. Co.*, 126 La. 347 (52 Sou. 537).

Refer to Arts. 3437, 3442, 3487, 3498.

Art. 3429. See Art. 852, 52 La. An. 198.

Actual possession of part of a tract of land, with title to the whole, is possession of the whole; and civil possession, sufficient for the purposes of a possessory action, is preserved by an intention to possess, though the actual possession be terminated; and this whether there be inclosures or not. *Sallier vs. Bartley*, 113 La. 400 (37 Sou. 6).

In the case of open prairie land, civil possession, continuing an actual possession, is not ousted by the act of plowing one or more furrows around the land, where the evidence shows that persons passed over the land without seeing these furrows, which probably had in a short time become hidden by being grown up with grass. *Jones vs. Goss*, 115 La. 926 (40 Sou. 357).

Where a railroad has taken possession of land for its freight and passenger depots, and has built the depots within seventy-five feet ^{of each other alongside the track,} the space between the ^{depots} will be considered as having

been taken possession of as part of the space needed for the convenient use of the depots.

And such possession will not be considered as having been abandoned simply from the fact that this space, after having been used for some time for depositing freight and baggage, has been converted temporarily into a flower garden. *John T. Moore Planting Co. vs. Morgan's L. & T. R. & S. S. Co.*, 126 La. 842 (53 Sou. 22).

Civil possession follows possession by occupancy until ousted by adverse actual possession. *Leonard vs. Garrett*, 128 La. 535 (54 Sou. 984).

Refer to Arts. 3437, 3443, 3493, 3494.

Art. 3431. See Art. 3427, 109 La. 654.

Art. 3433. See Art. 3426, 106 La. 360.

Art. 3436. See *Young vs. Town of Morgan City*, 129 La. 339.

Art. 3437. See Art. 3429, 113 La. 403, 115 La. 927, and 126 La. 890; Art. 3428, 126 La. 351; *Young vs. Town of Morgan City*, 129 La. 339.

There cannot be two conflicting constructive possessions at the same time of the same property, one in a party who first went into actual possession, and still holds the same, of a part as owner under a title drawing to himself constructive possession of the whole, and the other as a trespasser. The possession of the trespasser is *possessio pedis*, confined to what he grasps by his actual, real occupation. *Gilmore vs. Schenk*, 115 La. 386 (39 Sou. 40).

Actual possession of a part of a tract of land carries with it possession of the whole as shown by the boundaries described in the title of the possessor, which is admissible in evidence for the purpose of showing the nature and extent of the possession.

In actions of trespass there can be no examination of the title, and plaintiff's actual possession, if legal and peaceable, is sufficient to maintain the action even against the lawful owner who has disturbed such possession. *Mott vs. Hopper*, 116 La. 629 (40 Sou. 920).

Where a person has always paid his taxes upon his entire property, a sale of the property under another as-

essment is absolutely null, and cannot serve as a basis of prescription.

To serve as a basis for prescription, the title need not be recorded. Registry is required only for transferring the property, and in the law of prescription the title does not operate to transfer the property, but merely to establish the good faith of the possessor and fix the limits of the possession. *Bernstein vs. Leeper*, 118 La. 1098 (43 Sou. 889).

Actual possession of part of a tract of land as a homestead under an apparently valid title, translatable of property, to the whole, with the intention to possess according to the title, is such possession of the whole as would enable the possessor to acquire a perfect title by the prescription of ten years. *Leonard vs. Garrett*, 128 La. 535 (54 Sou. 987).

Where one acquires, though at the same time and from the same person, distinct and widely separated tracts of land, and takes actual possession of one or more of them, the rule that possession under title of part of an estate is possession of the whole has no application to the tracts not actually taken possession of. That rule applies and is confined to property so situated as to be within a common boundary or property of a single estate. *Gulf Refining Co. vs. Jeems Bayou Hunting & Fishing Club*, 129 La. 1021 (57 Sou. 322).

Refer to Arts. 3442, 3448, 3493, 3494, 3498. .

Art. 3438. See *Young vs. Town of Morgan City*, 129 La. 339.

Art. 3442. See *Ramos Lbr. & Mfg. Co. vs. Labarre*, 116 La. 572; **Art. 3426, 106 La. 360; Art. 852, 52 La. An. 193; Art. 3437, 118 La. 1100, and 128 La. 543; Art. 2133, 121 La. 62; Art. 3428, 126 La. 352.**

All that the law has done in favor of a purchaser in good faith is to give him the benefit of a prescription of ten and twenty years, though the property so purchased may belong to another person. *Sicard vs. Schwab*, 112 La. 479 (36 Sou. 497).

A tenant cannot change the nature of his possession by his own act, and cannot be permitted to dispute his landlord's title as long as he continues in possession. *Davidson vs. Fletcher*, 130 La. — (58 Sou. 504).

Refer to Arts. 3443, 3450, 3451.

Art. 3443. See Art. 852, 52 La. An. 198; Art. 3429, 115 La. 927; Art. 2133, 121 La. 62; Art. 3442, 130 La. —.

Art. 3444. See Art. 852, 52 La. An. 198; Art. 3437, 128 La. 543.

Art. 3448. See Art. 852, 52 La. An. 198.

Art. 3450. See Art. 3442, 112 La. 479.

Under Arts. 3450, 3454, 3455 of the Civil Code, and Arts. 46, 53 and 55 of the Code of Practice, one who has had quiet possession of timber land as owner for a year or more, whether in good faith or not, is vested with a right of possession, which may serve as a basis for a possessory action to recover the value of the timber removed; and in such action the question of title cannot be gone into at all, the defendant, for the purpose of a suit, having no title. *Smith vs. Grand Timber & Mfg. Co.*, 130 La. — (58 Sou. 153).

Refer to Arts. 3454, 3455.

Art. 3451: See Art. 502, 52 La. An. 2098; Art. 3442, 112 La. 479; Art. 503, 110 La. 337; Art. 3452, 121 La. 629, and 124 La. 858.

A party who sells certain real property with warranty of title and with a guarantee against debts and claims is not estopped to claim from the vendee rents for the property growing out of his occupation of it prior to his purchase.

A possessor in good faith is accountable for the fruits of the thing possessed from the time the true owner makes demand for restitution.

A petitory action claiming ownership of property and rents therefor is a continuous interruption of prescription, as to the claim for rents, until the final determination of the case. *Woodcock vs. Baldwin*, 110 La. 271 (34 Sou. 440).

Nor is a vendee to be held a possessor in bad faith merely because of the fact or the probability that a careful examination of the conveyance records would have disclosed the nullity of the vendor's title. *Blair vs. Dwyer*, 110 La. 333 (34 Sou. 464).

One who occupies no better position than that of trespasser may yet claim reimbursement of the cost of clearing land, whereby such land is brought into cultivation, and when to cultivate it is its cheap value.

He may also claim for such ameliorations as have added to the permanent value of the land. But he cannot claim the rights of a possessor in good faith. (Arts. 3451, 3452.) *Sigur vs. Burguières*, 111 La. 711 (35 Sou. 823).

The defendant, under the law, must be held to have known of the defectiveness of his title. The land was owned originally by plaintiff's ancestor. The legal representative of defendant knew that a patent had been issued in the name of the patentee years ago. The land in controversy illegally passed to the State at tax sale in 1867. It does not appear that any returns were ever made to the State showing forfeiture of the land. The asserted description did not describe. The land was not transferred under the forms required by the State to the levee board. The title was a nullity. *St. Paul vs. La. Cypress Lbr. Co.*, 116 La. 585 (40 Sou. 906).

Where immovable property is sold with warranty, and, it being thereafter sold under a mortgage granted by the vendor, and warranted against, is bought in by the mortgagee under an agreement whereby he sells it to the vendor and mortagor, the title so acquired inures to the benefit of the original vendee, and his vendor, going into possession under such title, becomes a possessor in bad faith, and is not protected by ten years' prescription. *Wells vs. Blackman*, 121 La. 394 (46 Sou. 437).

The property was sold at private sale. The attempt to raise it to the dignity of a judicial sale was aborted, as it could not thus be sold, as before stated. The purchaser had no reason to believe himself the master of the property which he had bought, and in consequence it cannot be held that he was in good faith, for that belief is one of the essentials of good faith. *Gremillion vs. Roy*, 125 La. 528 (51 Sou. 576).

Refer to Arts. 3452, 3453, 3474, 3478, 3518.

3453, 3474, 3478, 3518.

Art. 3452. See Art. 502, 52 La. An. 2098; Art. 3451, 121 La. 415; Art. 2451, 111 La. 712, 116 La. 595, and 121 La. 415; Art. 2626, 127 La. 844.

Where a person, believing himself to be entitled thereto, demands and holds possession of property by virtue of a construction placed by him upon a contract concerning the same, and upon the acts of those claiming adversely, who acquiesces in such demand and yields such possession, it cannot be said that the possession thus acquired and held is in bad faith. *Ball et al. vs. City et al.*, 52 La. An. 1550 (28 Sou. 109).

Where one cuts timber upon the land of another in good faith—that is, believing it to be his own land—he is liable for its rent at the stump, and not as manufactured into lumber. *J. F. Ball Lbr. Co. vs. Simms Lbr. Co.*, 121 La. 627 (46 Sou. 674).

The State cannot recover land from a third person for fraud of a patentee where such third person acquired it for a valuable consideration and without notice of the fraud.

An allegation in an action to set aside a sale of State land for fraud that defendants were holders in bad faith is not an allegation of a fact, but a conclusion of law. An exception of no cause of action admits the facts well pleaded, but not the conclusions of law. *State vs. Hackley, Hume & Joyce*, 124 La. 855 (50 Sou. 772).

Where property not susceptible of identification (from the description in the assessment and advertisement) purports to have been adjudicated for taxes, and the adjudicatee, preparing the act of sale, inserts a description which identifies property of which he subsequently claims possession under such deed, he must be held to be a possessor in bad faith. *Guillory vs. Elms*, 126 La. 561 (52 Sou. 767).

Refer to Art. 3451.

Art. 3453. See Art. 3451, 110 La. 277.

Not being a possessor in bad faith, he owes rents and revenues only from the time the property was judicially demanded of him. *Blair vs. Dwyer*, 110 La. 338 (34 Sou. 467).

Art. 3454. See *Sanders vs. Ditch et al.*, 107 La. 343; *Fellman vs. Succession of Guitierrez*, 117 La. 740; *Roberts vs. Edwards*, 126 La. 207; **Art. 2133, 121 La. 62; Art. 3450, 130 La. —.**

Art. 3455. See Art. 3450, 130 La. —.

Where the possessory and petitory actions, or features of these two actions, are sought to be combined in one petition, the possessory lapses, and only the petitory remains.

Where plaintiff alleges his ownership of real property, and the occupancy of the property by a railroad, and prays that the railroad be made to pay the value of the property by way of damages in case it elects to keep the property, the suit is petitory, and the burden of showing title rests upon the plaintiff. *Linder vs. Y. & M. V. Ry. Co.*, 116 La. 262 (40 Sou. 697).

Art. 3456. See Art. 852, 52 La. An. 194.

Art. 3459.

Prescription on a demand note runs from the date of the note, and not from demand. Otherwise, a ruling would be against Art. 3460 on this point. In the *Rhodes* case it was decided that prescription attaches to the right from the moment it may be exercised. This is so because from that moment the silence of the creditor begins. (Arts. 3528, 3459, 3460.) *Darby vs. Darby*, 120 La. 850 (45 Sou. 747).

Refer to Arts. 3460, 3528.

Art. 3460. See Art. 3459, 120 La. 850.

Art. 3461.

Acknowledgment of a debt will interrupt the course of prescription, but a mere acknowledgment of the existence of a debt will not operate the renunciation of an acquired prescription.

An expression of ability on the part of a debtor to pay his debt, followed by part payment, amounts to nothing more than a mere acknowledgment of the existence of the debt, and does not operate the renunciation of an acquired prescription. *Succession of Slaughter*, 108 La. 492 (32 Sou. 379).

Art. 3463.

Executory process may properly issue upon a note which, upon its face, appears to be prescribed; and the plea of prescription will not be supplied by the Court, nor can it be urged by the mortgagor, or those claiming under him, in an action of nullity brought after the sale and subsequent resale of the property; the remedy in such case being to enjoin the sale. *Huber vs. Jennings-Heywood Oil Syndicate*, 111 La. 747 (35 Sou. 889).

Art. 3466. See *Jones et al. vs. Jones et al.*, 51 La. An. 644.

Art. 3467.

Prescription is not interrupted by the service of citation on a day of public rest other than Sunday.

An action for damages for the death of a person is prescribed by one year from the date of the death. In the computation of time the day *a quo* is excluded, and the day *ad quem* must have elapsed. Thus, where death occurred on June 25, 1905, citation served on June 25, 1906, before midnight, will interrupt prescription. *Rady vs. Fire Ins. Patrol*, 126 La. 273 (52 Sou. 491).

Art. 3470.

A person who has knowledge of his rights and ample opportunity to establish them, but negligently allows others to believe that they are worthless, thereby superinducing such changes of position, and so affecting the rights of third persons, that relief cannot be afforded to those who have been less culpable, must himself bear the consequence of his own laches. *Heirs of Ledoux vs. Lavedan et al.*, 52 La. An. 312 (27 Sou. 196).

Art. 3474. See Art. 3451, 121 La. 415.

Art. 3475.

Where one possesses beyond his title, but sells according to his title, the vendee cannot, for the purpose of the prescription of thirty years *acquirendi causa*, tack to his own possession that of his vendor of the property which is not included in the deed by which he acquires, there being no privity between him and his vendor with respect to such possession. *Sibley vs. Pierson*, 125 La. 480 (51 Sou. 502).

Joint tenants may prescribe against the true owner by actual possession as owners of real estate for more than thirty years, provided the same has been continuous, etc. Neither title nor good faith are required in the prescription of thirty years. Persons who possess for themselves are considered as possessing as owners. The possession of one joint tenant is regarded in law as the possession of his co-tenants, their assigns and legal representatives. The question of who are the co-tenants of the party in possession does not affect the fact of his adverse possession for himself or for himself and others. *Chef Menteur Land Co. vs. Mercier*, 129 La. 1042 (57 Sou. 329).

Refer to Arts. 3488, 3499, 3500.

Art. 3478. See Arts. 825 and 833, 51 La. An. 118; Art. 1749, 117 La. 310; Art. 3451, 121 La. 415; GUILLO
lory vs. Elms, 126 La. 562; Art. 1749.

Where, in a petitory action between a party claiming land under a certificate of entry from the General Government and another claiming under a certificate of purchase from the State, final judgment was rendered in favor of the latter and against the former, such judgment will be *res judicata* against another action to recover the same land from the United States patentee, subsequently issued, based on the same certificate of entry, the parties being the same actually or in legal contemplation. And such judgment in favor of the holder of the State title furnishes a sufficient basis of prescription of ten years as against those who shall thereafter claim under and through those cast in the suit. *Hargrave vs. Mouton*, 109 La. 533 (33 Sou. 590).

A person who has been in possession of real estate as owner under a just title translative of property for ten years under the circumstances required by Arts. 3478 and 3479 is not barred from invoking in his favor the prescription provided for in those articles by the fact that at the date of his purchase there stood registered on the books of conveyance of the parish where the land was situated the registry of a prior sale of the same property to another person. *A fortiori* is he not barred by the registry of a mere promise of sale. *Wells vs. Goss*, 110 La. 347 (34 Sou. 470).

He who acquires the ownership of an immovable in good faith from one whom he believes to be the owner by a title which would be sufficient to transfer the ownership if

derived from the owner, and who holds continuous, uninterrupted, peaceable, public and unequivocal possession thereof as owner, prescribes for it in ten years. *Brewster vs. Hewes*, 113 La. 45 (36 Sou. 883).

A husband and wife, neither of whom has ascendants, descendants or collateral heirs, execute an instrument purporting to be a sale of community property. After the death of the wife, the vendee, who is the universal legatee of the wife, retrocedes the property to the husband by an instrument in which it is declared that it had been conveyed to her merely as security for a debt which has since been paid, and that the then purchaser is to retrocede it as though the conveyance had never been executed. The husband thereafter donates an undivided half interest in the property to the vendee, and then marries her, after which he dies, and his widow, as legatee and donee, holds possession of the property for more than ten years, when, she being interdicted, it is sold, at the instance of her curator, by order of Court. *Held*, that the adjudicatee must accept title. *In re Schmidt*, 114 La. 78 (38 Sou. 26).

Where, under a decree ordering plaintiff to be restored to the possession of certain premises, and condemning defendant to pay a certain amount of money, with costs, a writ is issued, to which a certified copy of such decree is annexed for the guidance of the Sheriff, commanding that officer to place the plaintiff in possession of the property, and further reciting "and that plaintiff have and recover of defendant \$150 per annum, and the costs of both courts," and such writ, with the acquiescence of all parties, is construed and enforced as a writ of *fieri facias*, *quoad* the judgment for money the purchaser of property sold thereunder will be regarded as a possessor in good faith whose title is protected by the prescription of ten years. *Decuir vs. Loeb*, 118 La. 332 (42 Sou. 955).

The purchaser of the property from the co-heirs of the plaintiff knew that the plaintiff was a minor, and that he was the heir of his grandfather, from whom he and his co-heirs inherited the land. He was, therefore, not a *bona fide* possessor. *Gerald vs. Barnhardt*, 128 La. 1099 (55 Sou. 688).

Good faith, to support the prescription of ten years, is based on the honest and positive belief of the possessor, founded on his just reasons that he is purchasing from the

real owner. Doubt as to the title of the vendor or as to his right to alienate is fatal to a claim of good faith. A doubt sufficient to induce the possessor to make an investigation of the title of his vendor is presumed to have continued down to the sale, in the absence of evidence tending to show its removal by adequate information derived from the records or other trustworthy sources. *Knight vs. Berwick Lbr. Co.*, 130 La. — (57 Sou. 900).

A Sheriff's deed, valid in form and translative of property, showing a sale made under a writ issued pursuant to a judgment of a competent Court, together with such writ and judgment, constitutes a just title which may serve as the basis of the prescription of ten years *acquirendi causa*. *Leverett vs. Loeb*, 117 La. 310 (41 Sou. 584).

Refer to Arts. 3479, 3481, 3482, 3484, 3485, 3486.

Art. 3479. See Art. 3478, 110 La. 348, 113 La. 52, and 114 La. 81.

A tax adjudicatee under Act 82 of 1884 who fails to pay the taxes for 1880 and subsequent years assumed by him acquires no title; and, if he takes possession of the property, is a possessor in bad faith in whose favor ten years' prescription does not run. *Millaudon et al. vs. Gallagher*, 104 La. 713 (29 Sou. 307).

The prescription of ten years, to be effective, must be supported, at least in the beginning, by corporeal possession. Mere paper title, without such possession is insufficient, even though the holder may pay taxes on the property. *George vs. Cole*, 109 La. 817 (33 Sou. 784).

A citation not signed by the Clerk will not interrupt prescription. The syllabus in the case of *Flower vs. O'Connell*, 17 La. 213, criticized. *Schwartz vs. Lake*, 109 La. 1081 (34 Sou. 96).

Property that has passed to the State for taxes, that was sold thereafter by the State over thirty years ago, that was assessed in the name of the buyer at tax sale for a number of years, and a second time sold for taxes in the name of the record owner as tax debtor, and that has since passed by mesne conveyance to defendant, cannot be recovered by the original owner, who was not in possession at the date the suit was brought. *Rovens vs. Robinson*, 117 La. 731 (42 Sou. 251).

A deed describing a different tract of land from the one in controversy is not translatable of the land in controversy, and, therefore, cannot serve as a basis for prescription. *Albert Hansen Lbr. Co. vs. Angeloz*, 118 La. 861 (43 Sou. 529).

Refer to Art. 3518.

Art. 3480. See *In re Schmidt*, 114 La. 81.

Art. 3481. See **Art. 1848, 52 La. An. 1302; Art. 3478, 113 La. 52.**

Suspension of prescription is susceptible of proof. The onus of proof was with plaintiff to show that prescription had been suspended. In the absence of all evidence, good faith must be presumed. *Breaux vs. Broussard*, 116 La. 215 (40 Sou. 639).

Whether the mortgagee and the adjudicatee has examined the title of his debtor, and has thereby, or otherwise, informed himself of its defects, is a question of fact; and, in the absence of affirmative proof on the subject, he is entitled, for the purpose of the plea of prescription of ten years, to the benefit of the presumption of good faith. *Lev-
erett vs. Loeb*, 117 La. 310 (41 Sou. 584).

A vague, uncertain and indefinite description in a title deed will not be notice to a purchaser in good faith.

Good faith is always presumed in matters of prescription. It is sufficient if the possession has commenced in good faith; and, if the possession should afterwards be held in bad faith, that shall not prevent the prescription. *Wil-
fert vs. Duson*, 131 La. — (58 Sou. 1019).

Refer to Arts. 3482, 3483, 3484, 3485.

Art. 3482. See **Art. 1848, 52 La. An. 1302; Art. 3478, 113 La. 52; Art. 3481, 131 La. —.**

Proof of the continuity of good faith is not a condition precedent to acquiring a title by prescription. *Bennett vs. Calmes*, 116 La. 598 (40 Sou. 911).

Art. 3483. See **Art. 3481, 117 La. 312; Ramos Mfg. & Lbr. Co. vs. Sanders**, 117 La. 630.

Art. 3484. See Art. 3478, 113 La. 52; Art. 3481, 117 La. 312.

A private sale by the surviving husband of the half interest of his minor son in bank shares, made without an order of the Court issued on the advice of a family meeting, is a nullity.

The purchaser at such a sale, knowing that the shares were acquired during the marriage, and that the wife was dead, was bound to know that the property belonged to the community, and was owned jointly by the surviving husband and the minor heir of the wife.

Error or mistake of law is never a good foundation for acquiring property by prescription. *Leury vs. Mayer*, 122 La. 487 (47 Sou. 839).

Refer to Art. 3506.

Art. 3485. See Art. 3478, 109 La. 537; Art. 3481, 117 La. 312.

The current of this prescription is suspended during the minority of the true owner. *Gilbert vs. Mazerat*, 121 La. 35 (46 Sou. 47).

Art. 3486. See Art. 3478, 113 La. 52; Ramos Mfg. & Lbr. Co. vs. Sanders, 117 La. 630.

A possessor who cannot fix exactly the origin of his possession cannot acquire by prescription. *Brewer vs. Y. & M. V. Ry. Co.*, 128 La. 545 (54 Sou. 987).

Art. 3487. See Art. 852, 52 La. An. 198; Art. 3428, 126 La. 352; Art. 3475, 129 La. 1045; Art. 783, 126 La. 876.

The cutting of trees in small quantities and at long intervals on an isolated tract of swamp land, unaccompanied by external and public signs indicating intention to hold and preserve possession as owners, does not constitute that actual, corporeal possession required as the basis of prescription. *Frederich vs. Goodbee*, 120 La. 783 (45 Sou. 606).

In judging of the significance of the acts relied upon for showing possession as a basis for prescription, it is important to observe the distinction between acts which are hostile in their character and those which may be consid-

ered simply of toleration. *John T. Moore Planting Co. vs. Morgan's L. & T. R. & S. S. Co.*, 126 La. 842 (53 Sou. 22).

Refer to Arts. 3501, 3502.

Art. 3488. See Art. 852, 52 La. An. 194; Art. 2133, 121 La. 62; Art. 3475, 129 La. 1044.

The word "possession," unaccompanied by a qualifier to indicate the kind of possession, is a term of very vague meaning, and does not necessarily mean a possession manifested by outward signs. It may mean legal or fictive possession. In the absence of proof to the contrary, everyone is presumed to possess for himself as owner. *Succession of Zebriska*, 119 La. 1077 (44 Sou. 893).

Refer to Art. 3500.

Art. 3490. See Art. 3426, 126 La. 891.

Art. 3492. See Art. 852, 52 La. An. 194.

The property in controversy was in the rear of and adjacent to the land of the Orphans' Home. The actual possessor who proves that he anciently had possession is presumed to have possessed during the intermediate time, unless there is proof to the contrary.

Per contra, the defendants in the petitory suit could acquire no legal title under a prescription general in terms, referring to no particular land. Besides, subsequent adverse title is sustained by prescription.

Cutting down a few trees in the swamps, without it appearing definitely whether the intention was to enter into possession, is not sufficient to maintain a title by prescription. *Dowdell vs. Orphans' Home Society*, 114 La. 50 (38 Sou. 16).

If we find that a homestead has apparently belonged to the present owner and his ancestors for centuries, we are strongly inclined to believe that it has descended from father to son by inheritance. There is nothing more than the presumption of continuity between two possessions; but that presumption necessarily vanishes on proof to the contrary. *Succession of Zebriska*, 119 La. 1088 (44 Sou. 893).

Art. 3493. See Art. 852, 52 La. An. 194; Arts. 3437 and 3429, 128 La. 539.

The latter prescription cannot prevail for the reason that the possession in support of it began less than ten

years before the institution of this suit. The Gulf Refining Company cannot join the possession under the Phillips-Garrett title to that under the Ashlin-Christian title; for it is only possessions under the same title that can thus be joined by filling out the prescriptive period. (Arts. 3493, 3494.) *Leonard vs. Garrett*, 128 La. 539 (54 Sou. 984).

Refer to Art. 3494.

Art. 3494. See Art. 852, 52 La. An. 202; Arts. 3493, 3437 and 3429, 128 La. 539.

Art. 3498. See Arts. 825 and 833, 51 La. An. 118; Art. 3428, 126 La. 351; Art. 3437, 128 La. 542.

Art. 3499. See Art. 3475, 129 La. 1044.

Art. 3500. See *Broussard vs. Guidry*, 127 La. 714; *Gerold vs. Barnhardt*, 128 La. 1099; *Brewer vs. Y. & M. V. Ry. Co.*, 128 La. 557; Arts. 3488 and 3475, 129 La. 1044.

To maintain the plea of prescription of thirty years, there must be corporeal possession, which must be continued, or the possession must be preserved, during the entire period by external and public signs announcing such possession and the intention to possess; and this rule applies with equal force to swamp as to other lands. *Ramos Lbr. & Mfg. Co. vs. Sanders*, 117 La. 616 (42 Sou. 158).

Refer to Arts. 3501, 3503.

Art. 3501. See Art. 3500, 117 La. 631; Art. 3487, 120 La. 788.

Art. 3502. See Art. 3487, 120 La. 788.

The vestiges of buildings to which Art. 3502 has reference are only such as are of the character to challenge attention. Remnants of pillars flush with the ground and barely noticeable are not of that character. *John T. Moore Planting Co. vs. Morgan's L. & T. R. & S. S. Co.*, 126 La. 843 (53 Sou. 22).

Art. 3503. See Art. 3500, 117 La. 631.

Though a will has not been presented to a Court, and though a particular legatee has not demanded delivery of the thing decreed to him from the executor or the heirs,

his taking possession thereof and remaining in possession will serve to interrupt the prescription of thirty years against his claim therefor. On the other hand, one who seeks to acquire the thing by such prescription must show uninterrupted, open possession thereof under a claim of ownership during the period mentioned. *Brewer vs. Y. & M. V. Ry. Co.*, 128 La. 545 (54 Sou. 987).

Art. 3506. See Art. 3484, 122 La. 409.

Art. 3509. See *Leury vs. Mayer*, 122 La. 489; Art. 3170, 52 La. An. 453.

This not being a suit for the return of a note which has been pledged, the prescription applicable to the acquisition of movables *acquirendi causa* does not obtain. *Hennessey, Liquidator, vs. Stempel, Guardian, etc.*, 52 La. An. 449 (26 Sou. 1004).

Art. 3510. See Art. 3170, 52 La. An. 453; Art. 2266, 126 La. 876.

Art. 3513. See Art. 2452, 114 La. 335.

Art. 3514.

One cannot prescribe against one's title. The case of *Cannon vs. Female Orphan Asylum*, 24 La. An. 452, overruled. *Female Orphan Society vs. Y. M. C. A.*, 119 La. 279 (44 Sou. 15).

Art. 3518. See *Hennessey, Liquidator, vs. Stempel, Guardian*, 52 La. An. 453; Art. 3479, 109 La. 1081; Art. 3451, 110 La. 277.

A citation not signed by the Clerk will not interrupt prescription. *Schwartz vs. Lake*, 109 La. 1081 (34 Sou. 96).

The service of citation with copy of petition interrupts prescription, although the citation does not bear the impress of the seal of the court. In *Schwartz vs. Lake*, 109 La. 1081, the paper relied on as a citation was not signed by the Clerk, was not dated, and was held to be no citation at all. *King vs. Guynes*, 118 La. 344 (42 Sou. 959).

Plaintiff filed in the District Court a petition, in which he set out a cause of action against the Town of Lafayette. He prayed that it be cited, and a judgment be rendered in his favor. The District Clerk copied the petition, and made

out a citation addressed to the Mayor, and the Sheriff served these on the Mayor. An exception filed by the town, that it had not been cited, was sustained by the court. A citation addressed to the town was then made out and served on the Mayor. The town then filed a plea of prescription, which had accrued in the meantime. *Held*, though the first citation was defective, the original service of the papers, as made upon the Mayor, interrupted prescription on the claim. *Gueble vs. Town of Lafayette*, 118 La. 494 (43 Sou. 63).

Art. 3519. See *Henry Block Co. vs. Papania*, 121 La. 689.

As five years had not elapsed since the enactment of the law of 1898, when the heirs of Levy bought in 1901, their purchase was made with notice of a suit pending within the meaning of the law.

If, however, the Act of 1898, page 155, No. 107, amending Art. 3519, be viewed as a statute of prescription, the conclusion reached must be the same. *Scovel vs. Levy's Heirs*, 118 La. 989 (43 Sou. 642).

Under Act 107 of 1898 a suit is considered abandoned when at any time before obtaining final judgment, plaintiff allows five years to elapse without taking any steps in its prosecution, and, where such suit pending is in this court on appeal, the appeal may be dismissed. *City of N. O. vs. N. O. Jockey Club*, 129 La. 65 (55 Sou. 711).

Where the defendant did not plead in the District Court that the suit had been abandoned for want of prosecution for five years, but, on the contrary, answered to the merits, the objection was waived. *Geisenberger vs. Cotton*, 116 La. 651 (40 Sou. 929).

Under Act 107 of 1898 a suit is considered abandoned when, at any time before obtaining final judgment, the plaintiff allows five years to elapse without taking any steps in its prosecution, and, at the suggestion of any party in interest, it may properly be stricken from the docket or dismissed. *Lockhart vs. Lockhart*, 113 La. 872 (37 Sou. 860).

Art. 3520.

Where a person who places his signature on a promissory note for the further security of the holder, whether he be considered a surety or co-maker, gives his written consent that the payment of the note be extended to a fixed date, but the extension is not granted by the holder, such consent,

regarded as an acknowledgment, has no other date than that which it bears, and the prescription applicable to promissory notes begins to run in his favor from that date, and not from the date to which the consent refers.

The mere fact that the holder of a note has failed to sue on it will not justify the inference that he consented to extend the time of payment in the face of positive testimony to the contrary. *Bank vs. Coco*, 107 La. 268 (31 Sou. 628).

A demand by one co-owner of another, to account in a partition proceeding for a portion of the property owned in indivision, which the latter has appropriated, though possibly as an independent demand barred by a comparatively short term of prescription, is subject as an incident to the partition, only to the prescription by which the action for partition would be barred, and such action cannot be prescribed against so long as the thing remains in common, and the community is acknowledged or proved. *Sibley vs. Pierson*, 125 La. 480 (51 Sou. 502).

Refer to Art. 3540.

Art. 3521.

A suit brought in her name would have had the effect of interrupting prescription, and she or her heirs were not without power to bring an action to safeguard their rights, and, therefore, they cannot avail themselves of the maxim *contra non valentem*. *Cox vs. Von Ahlefeldt*, 105 La. 544 (30 Sou. 175).

There is no law in this State to the effect that the appointment of a receiver, or the existence of a receivership, operates to interrupt the prescription of claims against the corporation to which the receiver was appointed; and the case presenting the closest analogy to that of an insolvent corporation is that of an insolvent succession with respect to which it is well settled that there is no exception in regard to prescription in favor of creditors of a succession, whether solvent or insolvent.

The rule that, so long as the creditor, with the consent of the debtor, retains possession of property belonging to the debtor, as security, there is a standing acknowledgment of the debt, and hence a standing interruption of prescription, has no application to a case where a party, by discounting, becomes the owner of a bill of exchange, with collaterals attached, since the collaterals go with the bill, and both cease

to be the property of the party who obtains the discount. *Taylor vs. Vosberg Mineral Springs Co.*, 128 La. 366 (54 Sou. 907).

Art. 3522. See Art. 3484, 122 La. 489; Art. 2630, 114 La. 1094.

More than five years had elapsed at the date of the filing of this suit. Prescription runs against all persons save when under certain exceptions. Minors and persons under interdiction cannot be prescribed against except in cases provided by law. *Cox vs. Von Ahlefeldt et al.*, 105 La. 544 (30 Sou. 175).

• Prescription of ten years, pleaded in protection of a title translatable of property, does not run against one who is a minor during his minority. *Messick et al. vs. Mayer*, 52 La. An. 1161 (27 Sou. 815).

An action for damages resulting from an offense or quasi offense is prescribed by one year. The prescription runs against minors reserving however to them their recourse against their tutors. *Goodwin vs. Bodcaw Lbr. Co.*, 109 La. 1050 (34 Sou. 74).

The right of action against a person who causes damage to another "in case of death shall survive in favor of the minor children."

Minor grandchildren, under the statute, cannot recover damages for personal injuries to their grandfather resulting in his death.

Children are descendants in the first degree, and grandchildren are descendants in the second degree. "Children" may include "grandchildren." But "minor" children do not include grandchildren, who are minors, or those who are of age, or any other descendants more remote. The statute limits the right to minor children. *Walker vs. V., S. & P. Ry. Co.*, 110 La. 718 (34 Sou. 749).

A minor is not estopped to sue for the recovery of property inherited from her mother, and illegally sold by her father because of the payment of the price to the administrator of her father's succession, or of the payment of the same by her father's administrator to her grandfather, who has not qualified as her tutor, and is not shown to have used the money for her benefit, or by reason of the fact that any part of such price has been paid to her after her majority,

when it does not appear that she was informed of the source whence it came.

The prescription of ten years *acquirendi causa* does not run against minors. *George vs. Delaney*, 111 La. 760 (35 Sou. 894).

Persons under interdiction cannot be prescribed against except in the cases specially provided by law, nor can they be estopped by silence, inaction or conduct. *Sallier vs. St. Louis, W. & G. Ry. Co.*, 114 La. 1090 (38 Sou. 868).

The cases thus provided by law are specified in Art. 3541, and the prescription of ten years is not one of them. *Scovel vs. St. L. S. W. Ry. Co.*, 117 La. 461 (41 Sou. 723).

The plaintiff became of age on November 4, 1901. As prescription was suspended during his minority, Art. 3509 has no application. *Leury vs. Mayer*, 122 La. 489 (47 Sou. 839).

Refer to Art. 3554.

Art. 3523.

The claim of the wife against the husband for the restitution of her paraphernalia is imprescriptible during the marriage, whether reduced to the judgment or not, and the wife may get title unless there is a vendor's lien on the property. *Compton vs. Dietlein & Jacobs*, 118 La. 363 (42 Sou. 964).

Art. 3526.

Prescription runs against vacant successions; but it does not run against vacant successions, where the State is present and takes the property which belongs to it under the law. *Cordill vs. Quaker Realty Co.*, 130 La. — (58 Sou. 819).

Art. 3528. See Art. 3459, 120 La. 850.

Art. 3530.

The presumption of payment resulting from the lapse of the time necessary to prescribe is *juris et de jure*. Art. 3519 does not apply to the prescription *liberandi causa*. *Hennessey, Liquidator, vs. Stempel, Guardian*, 52 La. An. 453 (26 Sou. 1004).

Art. 3534. See Succession of Landry, 120 La. 794; **Art. 3538, 121 La. 685.**

Five dollars a day (of twenty-four hours) is not an unreasonable charge for board and lodging and the services of a non-professional sick nurse to a patient afflicted in mind and body, having offensive sores, and who is utterly helpless; but the claim is prescribed by one year. *Succession of Alexander*, 110 La. 1027 (35 Sou. 273).

Defendant having filed a plea of prescription in the Supreme Court, the cause was remanded to the District Court for a trial of that plea, the appeal remaining otherwise in *statu quo*. *Myers vs. Lansing*, 114 La. 142 (38 Sou. 85).

The wages of a sick nurse are prescribed by one year. Where a person employed as sick nurse claims to have rendered additional service in other capacity, no recovery can be had on a *quantum meruit*, unless their value be satisfactorily proven. *Succession of Dolsen*, 129 La. 577 (56 Sou. 514).

Art. 3535. See Art. 3538, 121 La. 685.

Art. 3536. See Doyle vs. Negrotto, 124 La. 105; **Art. 2630, 128 La. 304.**

A claim for punitive damages for trespass committed is barred by a prescription of one year. *Levert vs. Sharpe et al.*, 52 La. An. 599 (27 Sou. 64).

The bond given by the Register of Conveyances for the Parish of Orleans, as required by Section 3153, R. S., constitutes a contract between that officer and the State for the benefit of those interested, that he will faithfully discharge the duties of his office, and, whilst an action of omission or commission, with respect to such duties, considered by itself may be a quasi offense, it is also a breach of the obligation of the bond, and an action on the bond for damages resulting therefrom is an action *ex contractu*, which is not barred by the prescription of one year, applicable to quasi offenses. *Gordon vs. Stanley*, 108 La. 182 (32 Sou. 531).

The civil action to disbar as authorized by Act 129 of 1896, and as now authorized by the rule of this Court adopted under the authority of the Constitution, is predicated upon the theory of the violation by an attorney of

the special obligation assumed by him as a consideration for the issuance of his license. It is not, therefore, an action *ex delicto*, and not prescribed in one year. *State vs. Fourchy*, 106 La. 744 (31 Sou. 325).

An action for damages resulting from an offense or quasi offense is prescribed by one year. The prescription runs against minors, reserving, however, to them their recourse against their tutor. (Arts. 3536, 3541.) *Goodwin vs. Bodcau Lbr. Co.*, 109 La. 1050 (34 Sou. 74).

Where in an action, governed by the law as it stood prior to the adoption of Act 33 of 1902, for damages for trespass upon land, including the cutting and removing of timber, it appears that no timber has been cut or removed, and no other trespass committed within the year preceding the institution of the suit, the plea of prescription of one year should be sustained. *Shields vs. Whitlock & Brown*, 110 La. 714 (34 Sou. 747).

The prescription denounced and regulated by Arts. 3526 and 3537 cannot be invoked for the protection of a tutor, who denudes the land of his ward of its timber. *Ingram vs. Heintz*, 112 La. 511 (36 Sou. 547).

The action of prescription under Art. 3536 is not taking property without due process of law. *Terry vs. Heisen*, 115 La. 1083 (40 Sou. 461).

Under the Civil Code the general rule is that all actions for damages for offenses and quasi offenses are prescribed by one year from the date the damage was sustained. Act 33 of 1902 provided that such prescription runs "where land, timber or property has been injured, cut, damaged from the date knowledge of such damage is received by the owner thereof." Held, that where the defendant is sued as a trespasser for damages for timber cut on lands, and pleads the prescription of one year, the burden is on the plaintiff to prove the date that knowledge of the alleged trespass was brought home to him. *Citizens Bank vs. Jeansonne*, 120 La. 393 (45 Sou. 367).

Where plaintiff combines, in the same action, a claim for damages for the bringing of an alleged malicious civil suit with a claim for damages for an alleged libel, contained in the pleadings in such suit, the rule that no legal injury results, and hence, that no cause and no right of action arises until the determination of such suit, applies equally to both claims, and the prescription of one year begins to

run as to both, only when the alleged malicious suit is determined. *Carnes vs. Atkins Bros.*, 123 La. 26 (48 Sou. 572).

A notary public or commissioner who fraudulently causes one to sign a deed is guilty of a quasi-offense, for which he is responsible in damages, and the plea of prescription of one year is a bar to recovery. This prescription begins to run from the date the damages accrue. *Thomas vs. Whittington*, 127 La. 552 (53 Sou. 860).

Refer to Arts. 3537, 3541.

Art. 3537. See Arts. 3536, 112 La. 511, 120 La. 400, 123 La. 33, 127 La. 555, and 110 La. 718.

This article was amended by Act 33 of 1902, p. 41, by adding the following. And where the land, timber or property has been injured, cut, damaged or destroyed, from the date knowledge of such damage is received by the owner thereof.

Where the damage resulting from a wrongful act itself (non-continuing) is continuing and progressive, the party whose property is damaged cannot postpone bringing an action for the same until after the full extent of the damage has been sustained and then sued for the whole damage. If he does so, a claim for the portion of the damage which he sustains one year prior to the bringing of the action will have been prescribed. *Griffin vs. Drainage Commission*, 110 La. 840 (34 Sou. 799).

To charge a person with a crime, without actual malice, but also without probable cause, is a quasi offense, the action to recover damages resulting from which is barred by a prescription of one year; and where there is an interval of time between the date upon which the charge is preferred, and that upon which it is made known to the person so charged, and to the public by the arrest of such person, the damage is sustained upon, and the prescription begins to run, from the day of the arrest. *King vs. Erskins*, 116 La. 480 (40 Sou. 844).

Civil Code, Art. 3537, provides that prescription runs from the day damages "are sustained." Plaintiff's mule was struck by defendant's train, and sustained a flesh wound. He was treated for a few days, and then turned out to pasture, where he was left to get well, but instead he died. Held, that the damages were not sustained until the mule died, and hence prescription did not begin to run

against the plaintiff's right to recover until that date. *Jones vs. T. & P. Ry. Co.*, 125 La. 542 (51 Sou. 582).

Art. 3538. See Succession of Landry, 120 La. 795; **Art. 2278, 125 La. 291.**

The change in the law made by Act 78 of 1888, amending Art. 3538, consists in applying the prescription of three years to accounts stated or rendered, and verbally or tacitly acknowledged, as well as to the open accounts to which it had previously applied. *Sleet vs. Sleet*, 109 La. 302 (33 Sou. 322).

The object and effect of Act 78 of 1888, amending Art. 3538, is not to prohibit proof of an interruption of prescription running upon account sued on, which are governed by that prescription by reason of parol evidence, but to prevent such evidence, when received, having the effect of shifting the prescription of three years applicable to those accounts to a prescription of ten years. *Henry Block Co. vs. Papania*, 121 La. 683 (46 Sou. 694).

Refer to Arts. 3534, 3535, 3544.

Art. 3539. See **Act 148 of 1906.**

Art. 3540. See **Art. 3520, 107 La. 270;** Succession of Landry, 120 La. 795; *Sigur vs. Burguieres, Executor*, 111 La. 1086 (36 Sou. 134).

After prescription has accrued upon a note a written acknowledgment of the continued existence of the debt does not carry with it a legal liability to pay, in the absence of a written promise to that effect. *Weil vs. Jacobs' Estate*, 111 La. 357 (35 Sou. 599).

Art. 3541. See **Art. 3536, 109 La. 1050;** **Art. 301, 124 La. 103.**

Amet vs. T. & P. Ry. Co., 41 Sou. 721, reaffirmed to the effect that the prescription of two years under Act 96 of 1896 applies only where the property has been taken in pursuance of a judgment of expropriation. *Scovel vs. St. L. S. W. Ry. Co.*, 117 La. 460 (41 Sou. 723).

Refer to Art. 3543.

Art. 3542. See *Jones vs. Jones*, 51 La. An. 643; *Henry Block Co. vs. Papania*, 121 La. 687; **Art. 940, 105 La. 544; Art. 1413, 113 La. 604; Art. 2221, 116 La. 118; Art. 1295, 118 La. 303; Art. 1994, 128 La. 39.**

Under Art. 3542, a contract *in declaration de simulation* is void *ab initio* and prescription does not apply. *Douglass vs. Douglass et al.*, 51 La. An. 1460 (26 Sou. 546).

The notice to delinquent taxpayers (in this case, the estate of the adjudicatee, which appeared upon the public records as the owner to whom the property has been assessed) not having been given as required by Art. 210 of the Constitution of 1879, and Act 85 of 1888, under which law the sale was made, the sale of the property for taxes and the title thereunder are null. And the action to recover the property is not barred by the prescription of five years nor that of three years. *Foreman vs. Hinchcliffe*, 106 La. 226 (30 Sou. 762).

Actions for the nullity of wills, based upon alleged defects in the manner of their execution, are barred by the prescription of five years under Art. 3542; but that prescription is inapplicable to an action, the purpose of which is to have it decreed that an instrument probated in common form, and without notice, as a last will, was never, in point of fact, signed, and that the mark in place of the signature was never affirmed by the putative author. *Cox vs. Lea's Heirs*, 110 La. 1030 (35 Sou. 275).

The nullity of a sale made by the wife in payment of her husband's debts is cured by the prescription of five years dating from the dissolution of the marriage, or the majority of the heir of the wife.

In the prescription *liberandi causa*, the question of good or bad faith plays no part. *Munholland vs. Fakes*, 111 La. 931 (35 Sou. 983).

The action to annul a judgment for fraud is prescribed by one year, dating from the discovery of the fraud, and the burden of proof is on the plaintiff in nullity to show when the discovery was made. If the evidence leave this date in doubt, the prescription will be maintained, especially where the inclination as to the alleged fraud was communicated to the plaintiffs by letter, and the letter is not pro-

duced nor its non-production accounted for. *Succession of Dauphin*, 112 La. 103 (36 Sou. 287). Art. 3542 does not apply.

The prescription of three years established by Art. 233 of the Constitution of 1898 against actions to annul tax sales, applies to a case where the property in question was Assessed to one who was without color of title, and was sold without notice to the owner; said owner having never been in actual possession, and having never paid taxes on said property, and Art. 3542 does not apply. *Terry vs. Heissen*, 115 La. 1070 (40 Sou. 461).

Art. 345 authorizes the property of minors to be sold in the case of a lictitation at the suit of a co-heir; but, before a lictitation can be ordered, the Court has to determine that the property cannot be conveniently divided in kind. (Art. 1339.) Therefore, we are inclined to believe that the sale should not have preceded the judgment. But this putting the cart before the horse amounts to nothing more than irregularity curable by five years. (Art. 3542.) *Chaffe vs. Minden Lbr. Co.*, 118 La. 756 (43 Sou. 397).

Upon the other hand, by the express terms of the law, the prescription which precludes the exercise of the right of action to reduce disposition, otherwise legal, within the disposable portion, begins to run only from the death of the donor. *Jones vs. Jones*, 119 La. 684 (44 Sou. 429).

Where, in an action for the partition of a single tract of land, judgment is rendered ordering that the tract of land be sold for cash as to the interest of the major, and on terms to be fixed by a family meeting as to the interest of the minor litigants, and no legal family meeting having been held, the Sheriff sells the land in two lots by separate adjudication, entirely for cash, an action brought by the minors, within five years after attaining majority, to annul the sale, is not barred by the prescription of five years in Art. 3543. But, if not brought within five years such action is barred by the prescription established in Art. 3542. *Doucet vs. Fenelon*, 120 La. 19 (44 Sou. 908).

Under Art. 1791, which provides that the nullity of agreements with an interdict cannot be pleaded by those with whom they are made, when sought to be enforced after the removable of a disability, or by those in charge of the rights of the interdict, the want of authority on the part of a guardian to give a valid consent to a partition for his

interdict would give rise, not to an absolute, but to a relative nullity only, which could be barred by prescription, and under Art. 3542, which provides that an action for a rescission of partition is prescribed by five years, and an action by the heirs of an interdict, brought six years after his death, to recover certain property partitioned was ineffectual as against the plea of prescription: *Hamilton vs. Hamilton*, 130 La. —— (57 Sou. 935).

Refer to Art. 3543.

Art. 3543. See *Jones vs. Jones*, 51 La. An. 644; **Art. 3542**, 51 La. An. 1461; **Art. 1101**, 112 La. 906; **Art. 1295**, 118 La. 303; **Art. 3542**, 120 La. 19; **Art. 3285**, 122 La. 160; **Arts. 301 and 3541**, 124 La. 103.

The sale of property for taxes, based upon an assessment and other proceedings prior to 1890, in the name of a dead man is null.

A tax adjudicatee under Act 82 of 1884, who fails to pay the taxes for 1880 and subsequent years assumed by him acquires no title, and if he takes possession of the property is a possessor in bad faith, in whose favor the prescription of ten years under Art. 3479 does not run.

The prescription of three years under Act 105 of 1874 does not cure such radical defects as those above indicated, nor does the prescription of five years under Art. 3543. *Milaudon et al. vs. Gallagher*, 104 La. 713 (29 Sou. 307).

The failure of the collector to offer the least quantity before selling the whole property affects the title with a vice for which it may be annulled in an action brought within the legal delay, but which is not so radical as to protect the owner against the prescription denounced by Section 66 of Act 85 of 1888, or Section 5 of Act 105 of 1874. *Cane vs. Herndon*, 107 La. 591 (32 Sou. 33).

Neither the prescription of five nor three years bars the action of the owner to recover property, adverse title to which is claimed under conveyances from the State, based on alleged forfeitures or adjudications, which were void by reason of radical nullities, which are here found to have existed. *George vs. Cole*, 109 La. 816 (33 Sou. 784).

Where, in such a case, the creditor files a petition, in which he specifies the property as belonging to the succes-

sion of the widow, announces his purpose to have it sold to pay her debts, causes the petition to be served upon the heirs, and cites them to make objection, if any they have, and, the heirs making no appearance, judgment is entered against them, they are estopped to assert, after the lapse of years, as against the purchaser, who thereafter bought at a sale made by the administrator under the order of the court, that the property belonged in part to the succession of their father, though such estoppel does not apply to minors. *Sicard vs. Gumbel*, 112 La. 483 (36 Sou. 502).

Under Art. 3543 objections to a succession sale to pay debts, pursuant to an order of the court, on the grounds that no tutor was appointed for the minor heirs, who were unrepresented at the making of the inventory, that the inventory was not taken within the time prescribed by law, that the property was inventoried at less than its value, and that no list of the debts of the succession was furnished as a foundation of the order of sale, are unavailable after the lapse of five years after the sale. *Thibodeaux vs. Barrow*, 129 La. 395 (56 Sou. 339).

Refer to Art. 2221.

Art. 3544. See Art. 3170, 52 La. An. 452; Art. 2221, 116 La. 116; Art. 3538, 121 La. 685; Art. 839, 51 La. An. 122

The prescription to be applied in any given case is that established by the law of the Forum, and the prescription ordinarily applicable to judgments in this State is ten years under Art. 3544. An exception to this rule is established by R. S. 2808, which provides that, where a judgment has been rendered in another State, between parties there residing, and has become barred by the law of such State, and the judgment debtor has thereafter come to Louisiana, the prescription established by the law *a quo* will be applied to such judgment in this State. But, where the judgment debtor comes to this State before the judgment against him is prescribed by the law of the State in which it was rendered, and is here sued on such judgment, the case is not within the exception, and the only prescription to be applied is that established by Art. 3544. And where the action in the judgment is begun and citation is served within ten years from the rendition of said judgment, the

prescription so established is interrupted. *Newman vs. Eldridge*, 107 La. 315 (31 Sou. 688).

Where the owner allows a railroad company to build a road upon his land and operate same for twenty years, he cannot reclaim the property free of the servitude, or interfere with the operation of the road.

His right would resolve itself into an action for the recovery of the value of the land used and for damages to his adjacent land; in either case, a personal action, barred by the prescription of ten years. *McCutchen vs. T. & P. Ry. Co.*, 118 La. 436 (43 Sou. 42).

In view of Act 73 of 1876, paragraph 3, providing that the cost of paving shall be a lien upon the abutting property until paid, and the fact that the ten-year limitation statute, Art. 3544, applies only to personal actions, while paving claims are strictly claims *in rem*, the claims of a paving contractor were not prescribed by the lapse of ten years. *Barber Asphalt Paving Co. vs. King*, 130 La. — (58 Sou. 572).

Art 3545.

The meaning of Arts. 2762 and 3545 will be construed strictly as against the surety on a builder's bond. *Police Jury vs. Johnson*, 111 La. 279 (35 Sou. 550).

Art. 3547. See *Schwartz vs. Lake*, 109 La. 1081.

A judgment rendered in 1879, and registered under the provisions of Act 5, Extra Session, of 1870, not being prescribed at the date of the passage of Act 67 of 1884, it was not the duty of the Board of Liquidation so finding it, to go behind that fact to examine and ascertain whether prescription might or might not have run against the judgment later. *Ducheene vs. Board of Liquidation*, 51 La. An. 1142 (26 Sou. 55).

A citation not signed by the Clerk will not interrupt prescription. *Schwartz vs. Lake*, 109 La. 1081 (34 Sou. 96).

When the second assignee sues to revive the judgment and the first assignee intervenes claiming ownership and praying also for a revival, but does not cite the defendant, the suit will interrupt prescription as to both. *Geisenberger vs. Cotton*, 116 La. 651 (40 Sou. 929).

Art. 3548. See *Doyle vs. Negroto*, 124 La. 105; *Succession of Zebriska*, 19 La. 1090; Art. 1023, 115 La. 1083.

Art. 3550. See Art. 3170, 52 La. An. 450.

Art. 3551. See *Woodcock vs. Baldwin*, 110 La. 277; Art. 3170, 52 La. An. 453.

Where the refusal to purchase or sell a tract of land is given in consideration of a loan for which a note is executed, with the agreement that the right thus accorded is to terminate upon payment of the note, *held*, that the agreement of the parties is the law of the case, and that under the agreement the prescription of the note was not its payment, and that, moreover, the agreement, embodying as it did, a species of pledge, operated as a constant interruption of prescription. *Succession of Darton*, 113 La. 875 (37 Sou. 861).

Art. 3552. See Art. 3170, 52 La. An. 453.

The Court declared that he had proved conclusively a valid and legal interruption of prescription by acknowledgment of the debtor, by a part payment in 1870, and by acknowledgments made to third persons in 1872 and 1875. The Court said it was no longer an open question in our jurisprudence that such acknowledgments, even when made to third persons, and not in the presence of the creditor, operated a valid, legal and binding interruption of prescription. (Arts. 3519 and 3552; 2 La. An. 314, 3 La. An. 324.) *Henry Block Co. vs. Papania*, 121 La. 689 (46 Sou. 694).

Art. 3554. See Art. 3522, 52 La. An. 1181.

Persons under interdiction cannot be prescribed against except in the cases especially provided by law, nor can they be estopped by silence, inaction or conduct. *Saltier vs. St. L. W. & G. Ry. Co.*, 114 La. 1090 (38 Sou. 868).

Art. 3556.**Paragraph 5. Assigns:**

Cox vs. Von Ahlefeldt, 105 La. 576.

Paragraph 8. Children:

Lynch vs. Knoop, 118 La. 616.

Succession of Roder, 121 La. 697.

Hodge's Heirs, vs. Kell, 125 La. 97.

Succession of Jacobs, 129 La. 434.

Succession of Baker, 129 La. 90.

Walker vs. V. S. & P. Ry. Co., 110 La. 718,

Paragraph 12. Family:

Succession of Baker, 129 La. 80.

Paragraph 14. Force:

Brannon vs Y. & M. V. Ry. Co., 129 La. 918.

Paragraph 15. Fortuitous Event:

Brannon vs Y. & M. V. Ry. Co., 129 La. 918.

Paragraph 18. Litigious Rights:

Sanders vs. Ditch, 110 La. 900.

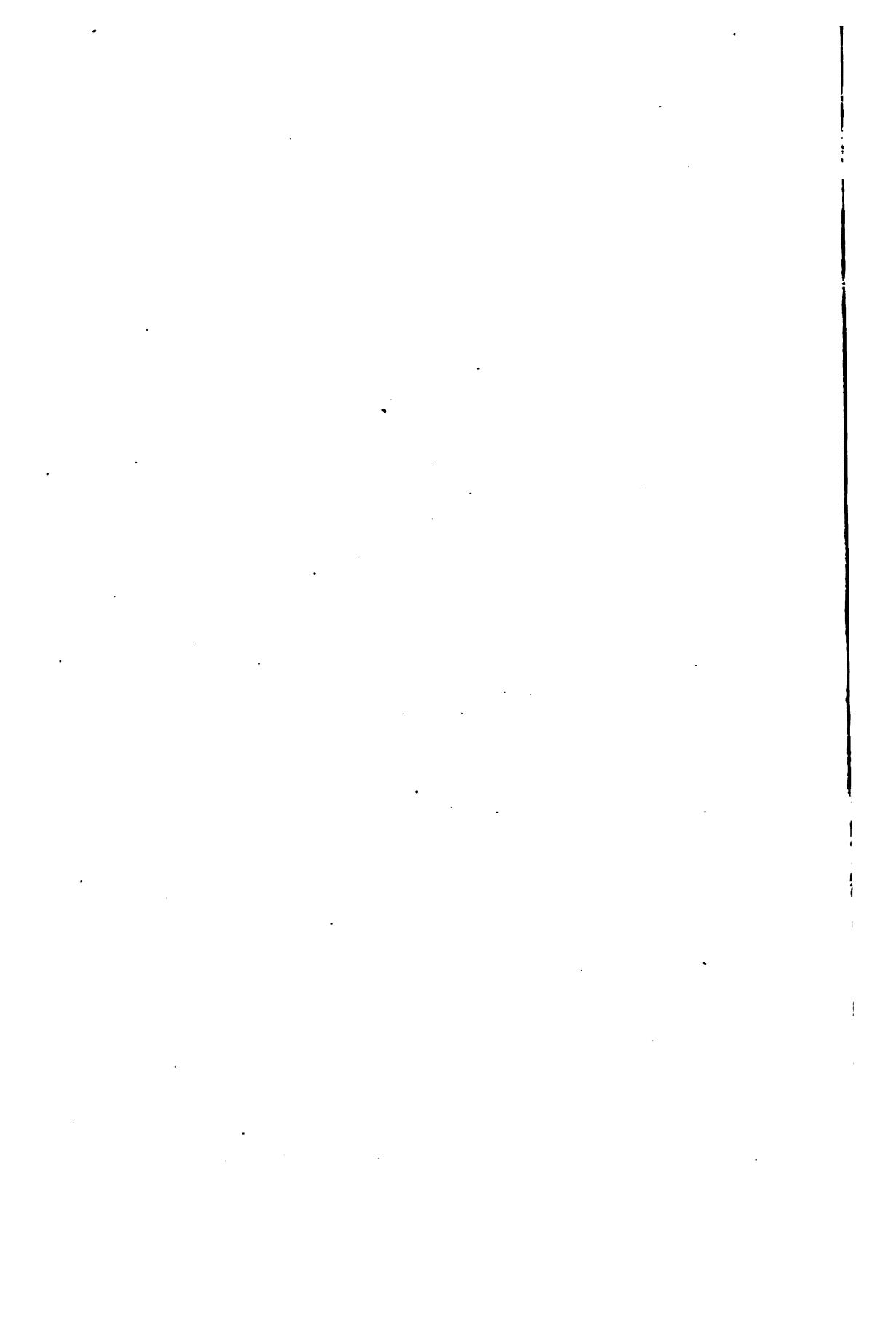
Paragraph 20. Obligee of Creditor:

State vs. Board of Assessors, 111 La. 998.

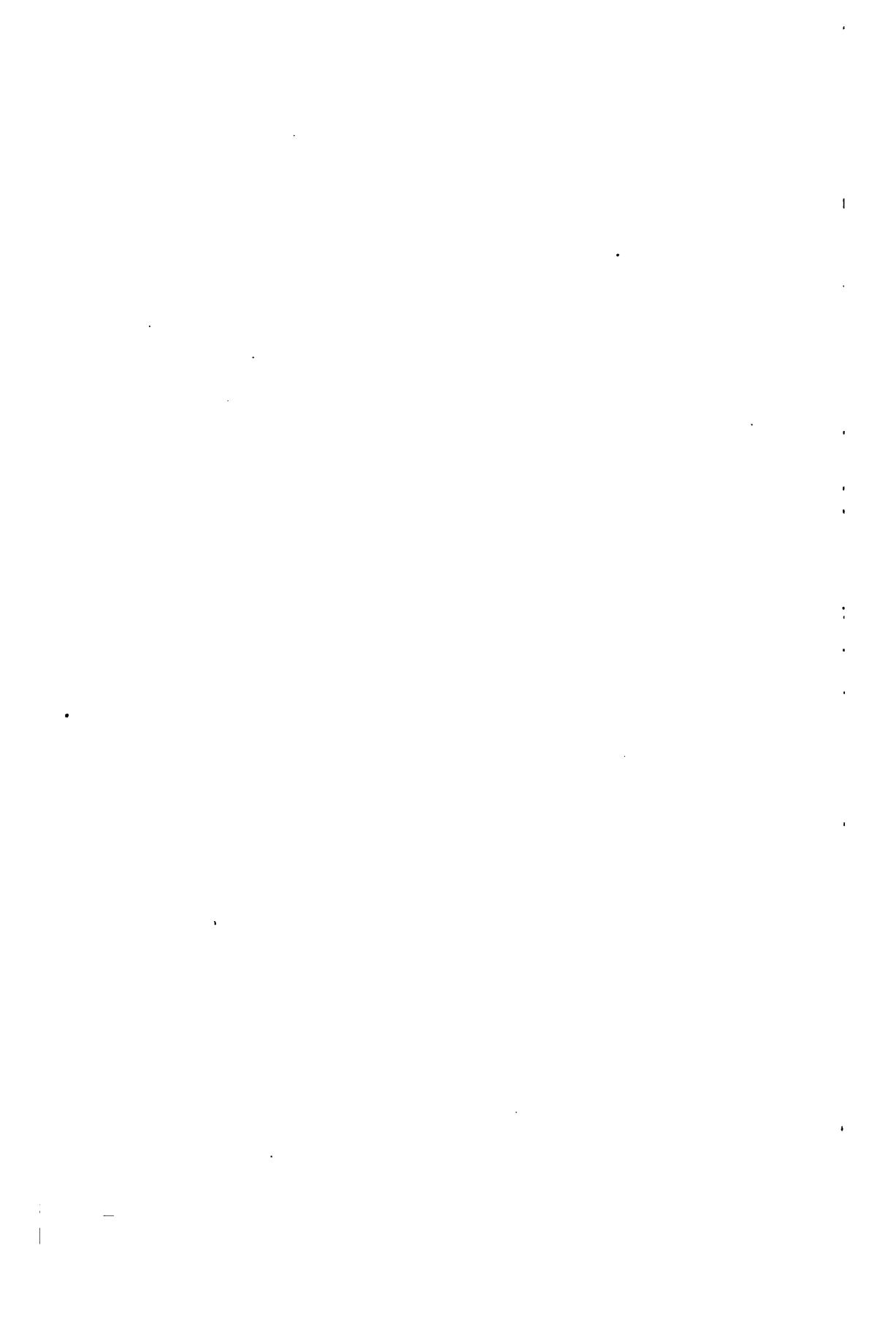
Morgan's L. & T. R. & S. S Co. vs. Stewart, 119 La. 407.

Paragraph 31. Thing Adjudged (Res adjudicata):

Robertson vs. Goldsmith, 130 La. ——.









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